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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

UNITED STATES EX REL. KENNETH MOSAY, MARY WASHINGTON, AND ARCHIE MOSAY, AND KENNETH MOSAY, MARY WASHINGTON, AND ARCHIE MOSAY, INDIVIDUALLY AND ON BEHALF OF THE ST. CROIX BAND OF CHIPPEWA INDIANS,

Petitioners,

vs.

BUFFALO BROTHERS MANAGEMENT, INC., INTERSTATE GAMING SERVICES, ROY C. PALMER, AND RONALD G. BROWN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Michael J. Wahoske
Counsel of Record
Steven J. Wells
Michael E. Florey
Mark A. Jarboe
James E. Townsend
DORSEY & WHITNEY
220 South Sixth Street
Minneapolis, MN 55402
Telephone: (612) 340-2600

Attorneys for Petitioners

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QUESTION PRESENTED

In enacting the Indian Gaming Regulatory Act ("IGRA") in 1988, Congress expressly found that then-current law was deficient because it "requires Secretarial review of management contracts dealing with Indian gaming, but does not provide standards for the approval of such contracts," and that "the establishment of Federal standards for gaming on Indian lands . . . [is] necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue." To address this problem, Congress enacted specific standards for gaming management contracts. It also provided for the Secretary of the Interior to continue to conduct the contract reviews until the National Indian Gaming Commision became operational, which did not occur for over 4 years. Given the above, the Question Presented is:

> Did the court of appeals err in deciding that Congress did not intend the contract review standards enacted in IGRA to apply immediately to post-enactment Secretarial review of gaming management contracts, but instead intended them to remain ineffective until the National Indian Gaming Commission became fully operational years later, with the result that, during the "gap" period created by the court of appeals' ruling, Indian tribes lost millions of dollars in tribal revenue because of contracts which violated the IGRA standards?

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In The
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UNITED STATES EX REL. KENNETH MOSAY, MARY WASHINGTON, AND ARCHIE MOSAY, AND KENNETH MOSAY, MARY WASHINGTON, AND ARCHIE MOSAY, INDIVIDUALLY AND ON BEHALF OF THE ST. CROIX BAND OF CHIPPEWA INDIANS,

Petitioners,

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BUFFALO BROTHERS MANAGEMENT, INC., INTERSTATE GAMING SERVICES, ROY C. PALMER, AND RONALD G. BROWN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Kenneth Mosay, Mary Washington, and Archie Mosay respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, reproduced in the Appendix at App. A, 1a–13a, is reported at 20 F.3d 739.1/ The opinion of the district court, found in the Appendix at App. B, 14a–23a, is unofficially reported at 1993 WL 643376.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254 (1) to review, by writ of certiorari, the judgment and opinion of the court of appeals dated March 31, 1994.

STATUTORY PROVISIONS INVOLVED

The provisions of 25 U.S.C. § 81 ("Section 81"), and the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701 *et seq.*, which form the basis of the authority by which and standards under which Indian gaming management contracts are reviewed, are set forth at App. C, 24a–26a.

STATEMENT OF THE CASE

I Introduction

This case arises under Section 81, which has long provided that certain contracts with Indians or Indian Tribes are subject to approval by the Secretary of the Interior ("Secretary"), and that an individual may bring suit in the name of the United States to recover any

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1/ Citations to Petitioners' Appendix will appear as "App. __."

monies received by a party pursuant to an unapproved contract. Petitioners commenced this action under the citizen suit provisions of Section 81 seeking to recover monies wrongfully received by respondents from the St. Croix Band of Chippewa Indians of Wisconsin ("St. Croix Chippewa" or "Tribe") pursuant to an unapproved contract relating and collateral to the management of the Tribe's gaming facilities at Turtle Lake and Danbury, Wisconsin.

II. Statement Of Facts And Procedural History

A. Legal History Of Indian Gaming

Section 81 is a nineteenth century statute which requires that all contracts with Indians or Indian tribes which are relative to the Indians' lands be approved by the Secretary of the Interior. For many years, the Secretary's contract review function has been performed by the Bureau of Indian Affairs ("BIA"). In *Wisconsin Winnebago Business Comm. v. Koberstein*, 762 F.2d 613, 616 n.3 (7th Cir. 1985), the court of appeals held that management contracts between tribes and outside contractors who sought to manage tribal bingo operations required approval by the Secretary pursuant to Section 81. *Id.* at 619.

In 1988, Congress enacted IGRA to provide a federal statutory basis for the conduct of Indian gaming. 25 U.S.C. § 2702(1). Congress authorized tribes to conduct live and mechanical bingo (Class II gaming), as well as blackjack and slot machines (Class III gaming). 25 U.S.C. § 2710(b)(1), (d).

B. The Parties

Petitioners Kenneth Mosay and Mary Washington are duly enrolled members of the St. Croix Chippewa, and at the time this suit was commenced were two of the five members of the Tribal Council. Petitioner Archie Mosay is an elder and the traditional Chief of the Tribe.

Respondents Buffalo Brothers Management, Inc. ("Buffalo Brothers") and Interstate Gaming Services, Inc. ("Interstate") are corporations wholly owned and controlled by respondents Roy C. Palmer and Ronald G. Brown, who were officers and directors of both corporations at all relevant times. C.A.App.277-280, 283-284, 288-291.2/

C. Buffalo Brothers' and Interstate's Agreements With The St. Croix Chippewa

On January 23, 1991, Interstate and the St. Croix Chippewa entered into an agreement ("Interstate Lease Agreement" or "Lease Agreement") for a term of five years, under which Interstate would have the exclusive right to supply and maintain Class II and III gaming machines for operation on St. Croix Chippewa lands. C.A.App.6-27. The agreement provided Interstate with compensation in the amount of thirty percent of gross profits from each slot machine, during the first two years of the agreement, and declining percentages in the following years. C.A.App.14-15.

On August 28, 1991, Buffalo Brothers and the St. Croix Chippewa entered into a Management Agreement

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2/ Citation to portions of the record contained in Appellants' Appendix or Short Appendix submitted to the court of appeals will appear as "C.A.App" or "C.A.S. App."

("Buffalo Brothers Management Agreement" or "Management Agreement") for a term of seven years, under which Buffalo Brothers would have the exclusive right to develop, manage, operate, and maintain the gaming facility owned by the St. Croix Chippewa, which is located at Turtle Lake, Wis. C.A.App.28-113. The Management Agreement provides Buffalo Brothers, so long as the Tribe owes it the sum of $1 million or more, with a fee in the amount of forty percent of the net revenues of that gaming facility. C.A.App.45-46.

D. The Section 81 Approval Process

The Buffalo Brothers Management Agreement was submitted to the Bureau of Indian Affairs ("BIA") in September of 1991 for review and approval pursuant to 25 U.S.C. § 81 and IGRA. C.A.App.116. The Area Director of the Minneapolis Area Office of the BIA, Dr. Earl J. Barlow, approved the Management Agreement on January 28, 1992. C.A.App.117-118. Although it contained terms found nowhere else that were integral to the management of the casinos, the Interstate Lease Agreement was *not* submitted to the BIA for approval along with the Buffalo Brothers Management Agreement. App. 16a. The Interstate Lease Agreement was neither considered nor approved by the BIA during its review and approval of the Management Agreement. App. 16a.

E. Monies Received By Respondents From The St. Croix Chippewa Gaming Enterprise

The St. Croix Casino in Turtle Lake opened for business on May 28, 1992. C.A.App.119-120. From the outset, the Tribe's casino produced substantial revenues.

C.A.App.119-120. Unfortunately for the Tribe, nearly seventy percent of the revenues being generated by its casino went to respondents Palmer and Brown via their two companies, Buffalo Brothers and Interstate.

Under the unapproved Lease Agreement, Interstate first received thirty percent of the gross revenues generated by the slot machines. C.A.App.14-15. The remaining seventy percent of slot revenues became general casino gross receipts, along with gross revenues from the table games, such as blackjack. C.A.App.31. The casino enterprise (in other words, the Tribe) then paid all casino expenses from this pool of gross revenues. C.A.App.31-32, 45-46. The money remaining after expenses became net profits. C.A.App.32. Buffalo Brothers then received forty percent of the net profits as its management fee, with the remaining sixty percent going to the Tribe. C.A.App.45-46. The Tribe was then required to pay to Buffalo Brothers, from the Tribe's sixty percent share, principal and interest on the construction loan. C.A.App.45.

After the counting was done, Palmer and Brown, through their corporations, received approximately twice as much money from the casino as did the Tribe. C.A.App.133, 139. An audit covering the period from the opening of casino operations in the spring of 1992 through September 27, 1992, revealed that Buffalo Brothers and Interstate received $9,158,399 from casino operations, exclusive of loan repayments. C.A.App.133, 139. During that same period, the Tribe received merely $4,811,528. C.A.App.133. Therefore, during this period respondents received sixty-seven percent of the revenues from the Tribe's gaming operations, *not* including amounts received by Buffalo Brothers in repayment of the construction loan.

Of particular concern in this arrangement was the fact that the slot machines that the Tribe was leasing from Interstate were generating enough revenue to pay for themselves approximately every two months, a situation predicted by respondents before the casino even opened. C.A.App.154-155. By the end of 1992, the Tribe had paid Interstate $9,048,045 under the Lease Agreement, which amount alone was twice the purchase price of the machines.3/ C.A.App.153. It unquestionably would have been in the Tribe's best interest to purchase the slot machines outright, rather than lease them from Interstate. C.A.App.155-156.

The Tribe had no experience in gaming matters, and was relying on its manager, Buffalo Brothers, to advise it as to matters such as whether to purchase or lease slot machines. C.A.App.153. As the manager, Buffalo Brothers had a fiduciary duty to advise the Tribe concerning gaming matters such as leasing or buying slot machines. C.A.App.153. Unfortunately, Palmer, Brown, Buffalo Brothers and Interstate were on both sides of these transactions. Rather than advise the Tribe to purchase slot machines, Palmer and Brown furthered their self-dealing by having Interstate *extend* the Lease Agreement by almost three years, by amendment executed on April 3, 1992, to run contemporaneously with the Buffalo Brothers Management Agreement.4/

3/ As the term of the Interstate Lease Agreement was seven years, the Tribe would have paid Interstate many times the value of the slot machines it was leasing from Interstate if the Lease Agreement had run its full course. C.A.App.114-115, 155-156.

4/ A draft report by Michael A. Liethen, then Director of the Office of Indian Gaming of the Wisconsin Gaming Commission, calculated that this breach of fiduciary duty by

C.A.App.114-115, 155-156. This amendment was also not submitted to the BIA for approval as a collateral agreement.

F. Petitioners' Lawsuit

Petitioners brought suit in December of 1992 under the citizen suit provisions of Section 81.5/ Counts I and II of petitioners' Complaint, which relate to the issues raised herein, alleged that respondents' gaming management contract with the St. Croix Chippewa had not been properly approved as required by 25 U.S.C. § 81.

In enacting IGRA, Congress provided standards for the approval, pursuant to Section 81, of Indian

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Buffalo Brothers reduced the Tribe's revenue by approximately $6.1 million ($5.3 million in unnecessary payments to Interstate and $800,000 in lost depreciation). C.A.App.155. The report also conclusively demonstrated that Buffalo Brothers' own projections prior to the opening of the new St. Croix Casino showed that the slot machines would generate sufficient revenue so that the Tribe easily could have purchased the machines, rather than leasing them from Interstate. C.A.App.154-155. Mr. Liethen's draft report was based on a comprehensive audit of the casino enterprise by the Arthur Andersen accounting firm. C.A.App.148.

5/ Section 81 provides that any contract not approved by the Secretary is void, and allows for suit to be brought in the name of the United States to recover any monies received pursuant to a void contract. Specifically, Section 81 provides that one-half of the monies recovered shall be paid to the United States Treasury for the use of the Indian tribe, and the other half shall be paid to the person bringing suit. In this case, petitioners are suing not for personal gain, but to protect the interests of the St. Croix Chippewa. Petitioners have assigned any recovery they may receive in this case, less costs and attorneys' fees, to the Tribe. C.A.App.161-162.

gaming management contracts such as the one at issue in this case. 25 U.S.C. § 2701(2). These standards are contained in IGRA Section 12 (25 U.S.C. § 2711), and include, in relevant part, the following definition of "management contract":

> For purposes of this chapter, any reference to the management contract described in paragraph (1) shall be considered to include all *collateral agreements* to such contract that relate to the gaming activity.

25 U.S.C. § 2711(a)(3)(emphasis added).

Petitioners' Complaint alleged that because of the common ownership and close relationship of Buffalo Brothers and Interstate, the Interstate Lease Agreement was a "collateral agreement" to the Buffalo Brothers Management Agreement. C.A.App.171-183. As such, it was deemed to be a part of the management contract with the Tribe. Because the collateral Interstate Lease Agreement was not submitted to or approved by the BIA along with the Buffalo Brothers Management Agreement, the entire management contract, as defined by federal law, was never approved for purposes of Section 81. Petitioners also contended that even absent IGRA's collateral agreement provision, respondents' fiduciary obligations and the trust status of the Secretary's review of management contracts required that respondents disclose their entire financial relationship with the Tribe.

Accordingly, petitioners sought a declaration that the Buffalo Brothers Management Agreement and the collateral Interstate Lease Agreement, which together form respondents' gaming management contract with the Tribe, were null and void. C.A.App.171-183. Petitioners further sought to recover and to return to

the Tribe all monies received by respondents from the Tribe pursuant to the void contracts.6/ C.A.App.171-183.

G. Rulings of the Courts Below

By Memorandum and Order dated August 17, 1993, the district court granted respondents' motion for summary judgment and denied petitioners' motion for summary judgment. App. 14a–23a. The district court ruled that the standards set forth by Congress in IGRA for Section 81 approval of management contracts were "inapplicable" to the Section 81 approval of the contract at issue in this case, "as if IGRA had not been enacted." App. 19a. The district court based this ruling on its "common sense" and its reading of 25 U.S.C. § 2709, which provides that the Secretary of the Interior would continue to exercise the authority to approve Indian gaming management contracts pursuant to Section 81 until such time as the new National Indian Gaming Commission ("Commission") became organized and prescribed regulations. App. 19a–20a.

Petitioners filed an appeal in the United States Court of Appeals for the Seventh Circuit on October 26, 1993. On March 31, 1994, the court of appeals affirmed the district court's grant of summary judgment. App. 1a–12a. The court of appeals ruled that "[a]lthough casino management contracts were within the Bureau's

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6/ Petitioners filed this case on December 17, 1992. C.A.App.163-170. On December 29, 1992, Interstate, Buffalo Brothers and the St. Croix Chippewa entered into an Equipment Lease Cancellation and Purchase Agreement, which purported to cancel the Interstate Lease Agreement and sell the slot machines to the Tribe. C.A.App.C. 184-190. By this time, respondents had already received over $9 million pursuant to the Lease Agreement. C.A.App.C. 153.

authority under the old regime, we do not think the Bureau was required to exercise that authority in accordance with the substantive criteria of the new law." *Id.* at 10a. The court of appeals further held that the BIA had no authority at all to review "collateral contracts," since such contracts were only subject to review under the new IGRA Section 81 standards and not, according to the court, under Section 81 as it existed prior to IGRA. *Id.* at 9a–10a.

The court of appeals recognized, however, that its decision creates an "anomoly" which destroys this carefully crafted scheme to insure universal compliance with IGRA. App. 11a. The court of appeals further complained that "[t]ere is no ideal interpretive solution in this case," ostensibly because "[t]he statute is fractured...." *Id.* at 12a.

REASONS FOR GRANTING THE WRIT

The court of appeals' decision admittedly "fractures" IGRA by creating a four-year gap following the statute's passage, during which the IGRA standards for Section 81 review of management contracts were not in effect and could not be enforced. The creation of this gaping hole in Indian gaming law, which the court of appeals referred to as an "anomoly," is contrary to the express intent of Congress, the BIA's own interpretation of its obligation to implement IGRA standards in perfoming its Section 81 review authority, and long-established federal policy involving construction of statutes intended for the benefit of Indians. The decision of the court of appeals frustrates express Congressional intent in an area of traditional federal concern and special federal responsibility, and eliminates any remedy for violation of IGRA's Section 81 standards during the four-year gap period.

THE INDIAN GAMING REGULATORY ACT SHOULD BE INTERPRETED AS HAVING FULL FORCE AND EFFECT FROM ITS ENACTMENT DATE

A. The Court Of Appeals Decision Creates An Unwarranted Four-Year Gap In The Effective Date Of IGRA, During Which The Statute Was Deemed Unenforceable In Violation of Express Congressional Intent

1. IGRA Was Effective Upon Enactment

"It is well established that, absent a clear direction by Congress to the contrary, a law takes effect on the date of its enactment." *Gozlon-Peetz v. United States*, 498 U.S. 395, 404 (1991). Prior to the decision of the court of appeals here, every court faced with an issue under IGRA either assumed that IGRA was in force on the day of its enactment in 1988, *see, e.g., Spokane Indian Tribe v. United States*, 972 F.2d 1090 (9th Cir. 1992); *United States v. Cook*, 922 F.2d 1026 (2d Cir. 1991); *Ross v. Flandreau Santee Sioux Tribe*, 809 F. Supp. 738 (D.S.D. 1992); or, like a previous panel of the Seventh Circuit itself, held expressly that IGRA became effective on October 17, 1988. *Oneida Tribe of Indians v. State of Wisconsin*, 951 F.2d 757, 759 (7th Cir. 1991).

The courts below, however, held for the first time that at least a portion of IGRA was not applicable before a newly created agency, the National Indian Gaming Commission (NIGC), "was up and running," which did not occur until nearly five years after IGRA was enacted. App. 12a. The courts below could find no express language in IGRA delaying the effective date of the statute. The only basis for the lower courts' ruling is §2709 of IGRA, which provides in relevant part:

> Notwithstanding any other provision of this chapter, the Secretary shall continue to exercise those authorities vested in the Secretary on the day before October 17, 1988, relating to supervision of Indian gaming until such time as the Commission is organized and prescribes regulations. The Secretary shall provide staff and support assistance to facilitate an orderly transition to regulation of Indian gaming by the Commission.

25 U.S.C. § 2709.

This cannot, under any reading of the statute, be construed as an expression of intent to delay indefinitely the implementation of the IGRA standards. As will be demonstrated below, this provision merely reflects Congress's acknowledgment that the Commission would not become operational immediately. Therefore, the transfer of approval authority from the Secretary to the Commission would necessarily be delayed. Accordingly, Congress provided that the Secretary would retain the authority to approve management contracts until that transfer occurred. This simply does not constitute a "clear direction" from Congress that the approval *standards* set forth in IGRA were to have no effect whatsoever until the Commission assumed its authority. Not only does the court of appeals' decision violate the presumption that IGRA took effect on the date of its enactment, it mandates a result opposite to the one expressly intended by Congress.

2. Congress Intended that the IGRA Standards Would Be Used From the Date of Its Enactment

a. This Court Should Apply the Express Intent of Congress Set Out in IGRA

This Court has stated unambiguously that the intent of Congress, as expressed in the language of the statute, is the controlling factor in interpreting a Congressional statute. "As always, we begin with the language of the statute and ask whether Congress has spoken on the subject before us. 'If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'" *Norfolk & Western R. Co. v. Train Dispatchers*, 499 U.S. 117, 128 (1991) (quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-52 (1984)); *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 570 (1982). *See also Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). Indeed, this Court has held that "'[a]s in all cases of statutory construction, our task is to interpret the words of th[e] statut[e] in light of the purposes Congress sought to serve.'" *Norfolk Redevelopment & Housing Authority v. Chesapeake & Potomac Tel. Co.*, 464 U.S. 30, 36 (1983) (quoting *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 608 (1979)); *see Diamond v. Chakrabarty*, 447 U.S. 303, 318 (1980).

Further, in addition to the plain words, the structure of the statute also has importance in determining Congressional intent. "In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy. " *Crandon v. United States*, 494 U.S. 152, 158, (1990); *K*

mart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51 (1987). Courts take care to adopt an interpretation of a statute which does not "produce a result demonstrably at odds with the intention of the drafters." *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989).

b. Both the Language and Structure of IGRA Reveal Congress's Intent to Subject All Management Contracts to Review Under the IGRA Standards

i. Congress realized that there was an immediate need to regulate Indian gaming and provide standards for approval of Indian gaming management contracts

In enacting IGRA, Congress sought to provide a comprehensive regulatory scheme for Indian gaming. 25 U.S.C. § 2702. One important reason for Congress's decision to enact IGRA was its determination that the Secretary needed standards to inform its determination to approve or disapprove a gaming contract pursuant to 25 U.S.C. §81. Congress states in IGRA:

> The Congress finds that –
> * * *
> (2) Federal courts have held that section 2103 of the Revised Statutes (25 U.S.C. §81) requires Secretarial review of management contracts dealing with Indian gaming, *but does not provide standards for approval of such contracts.*

25 U.S.C. §2701(2)(emphasis added).

Congress found that "numerous Indian tribes have become engaged in or have licensed gaming

activities on Indian lands... ." 25 U.S.C. § 2701 (1).

Congress, then, expressly recognized an *immediate* need for Section 81 standards to regulate Indian gaming management contracts. The problems associated with management contracts were not, as the Congress recognized, a future problem: Indian gaming was exploding in 1988, and with it came the potential for the victimization of Indians by means of management contracts that were not subject to clear and rigorous standards.

The congressional declaration of policy contained in IGRA further states that "the establishment of Federal standards for gaming on Indian lands . . . [is] necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue." 25 U.S.C. § 2702(3).

ii. Congress provided the standards for Section 81 review and approval of management contracts in IGRA

Section 12 of IGRA (25 U.S.C. § 2711) sets forth detailed standards which must be met by a management contract before it receives approval pursuant to Section 81.7/ IGRA requires that every management contract

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7/ The requirements of 25 U.S.C. § 2711 include:

* complete background information on all outside managers, including disclosure of other gaming-related contracts [collateral agreements] between the individual contractors and the tribe. 25 U.S.C. § 2711(a).

* adequate accounting procedures, access by tribal officials to the gaming operation, and a right to verify daily gross revenues. 25 U.S.C. § 2711(b)(1),(2).

have *"at least"* the protective provisions set forth in 25 U.S.C. § 2711 before it can receive Section 81 approval. 25 U.S.C. § 2711(b) (emphasis added). IGRA also establishes firm limitations on the fee that a management contractor may receive pursuant to a contract for management of an Indian gaming facility. Managers may receive no more than forty percent of net revenues of the gaming operation (thirty percent in some circumstances). 25 U.S.C. § 2711(c)(1),(2). Also, in complete accord with the trust responsibility of the United States towards Indian tribes, the IGRA standards provide for disapproval of a management contract if "a trustee, exercising the skill and diligence a trustee is commonly held to, would not approve the contract." 25 U.S.C. § 2711(e)(4).

There can be no doubt that the above-noted provisions are the "standards for approval of [management] contracts" referred to by Congress in the opening Section of IGRA. 25 U.S.C. § 2701(2). These standards are the embodiment of the policy underlying IGRA -- to ensure that monies generated from tribal gaming enterprises benefit the tribe. The standards operate to keep dishonest contractors from insinuating

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* a minimum guaranteed payment to the tribe which has preference over any construction debt owed by the tribe to the contractor, and an agreed ceiling on repayment of construction debt. 25 U.S.C. § 2711(b)(3),(4).

* a contract term not to exceed five years, or seven years under certain circumstances. 25 U.S.C. § 2711(b)(5).

* grounds and mechanisms for terminating the contract. 25 U.S.C. § 2711(b)(6).

themselves into the tribe's gaming operation. The standards also take great care to ensure that the tribe is not taken advantage of during the contract negotiation phase, and require that important protections be built into each management contract before it can receive Section 81 approval.

iii. Congress, in IGRA, transfered the responsibility for Section 81 review and approval of management contracts to the Commission

Congress provided in IGRA that "[t]he authority of the Secretary under section 81 of this title, relating to management contracts regulated pursuant to this chapter, is hereby transferred to the Commission." 25 U.S.C. § 2711(h).

iv. Congress provided that the Secretary would retain the authority to review and approve management contracts until the Commission became operational

Although Congress created the Commission, a new agency, to regulate Indian gaming and to implement the standards Congress set forth in IGRA for Section 81 approval of management contracts, it recognized that the new Commission would not be able to assume its role immediately. Accordingly, Congress provided in 25 U.S.C. § 2709 for the Secretary to retain the approval authority during the interim. The Commission was not fully organized until February 22, 1993. 25 C.F.R. Parts 501 *et seq.* (1993). Accordingly, the Secretary, through the BIA, retained interim authority over Section 81 approval of gaming contracts for over four years after the enactment of IGRA.

v. Congress intended that the Secretary apply the IGRA standards while exercising his interim authority

The IGRA approval standards were fully set forth in the statute on the date it was enacted, and there is no limitation stated as to their immediate applicability. 25 U.S.C. § 2711. Although Congress saw the need to leave the *authority* for Section 81 review temporarily with the Secretary, it did not intend that the Secretary ignore the *standards* it promulgated for the exercise of that authority while the Commission was being formed. The provision of IGRA transferring Section 81 approval responsibility to the Commission states that "[t]he *authority* of the Secretary under section 81 ... is hereby transferred to the Commission." 25 U.S.C. § 2711(h) (emphasis added). Likewise, 25 U.S.C. § 2709 states that, in the interim, "the Secretary shall continue to exercise those *authorities* vested in the Secretary... ." 25 U.S.C. § 2709 (emphasis added).

25 U.S.C. § 2709 is clearly aimed at addressing the issue of *which* government agency would have authority to grant Section 81 approval of gaming contracts during the interim period before the Commission was organized; it does not instruct the Secretary to ignore the IGRA standards while exercising that authority. To the contrary, Congress specifically stated that one of its primary reasons for undertaking this massive piece of legislation was to provide standards for Section 81 approval of gaming contracts. 25 U.S.C. § 2701(3). Having provided those standards as of the effective date of the statute, 25 U.S.C. § 2709 simply cannot be read to suggest that Congress intended that the Secretary should ignore -- for over four years --

the approval standards contained in IGRA while exercising the interim approval authority.

Congress's intent that the IGRA standards have immediate effect is further evidenced by the Commission's authority to review management contracts once it is operational. Pursuant to 25 U.S.C. § 2712(a), (c), the Commission is expressly authorized to review *pre*-IGRA (*i.e.*, pre-October 1988) contracts to ensure that they conform to (or are brought into compliance with) the standards of IGRA. Clearly, Congress wanted to ensure that management contracts would not escape review under IGRA's standards simply because they were signed prior to the enactment of IGRA.

The Commission is also authorized to review and approve contracts signed *after* the Commission became operational. 25 U.S.C. § 2711. Again, this is to ensure that those contracts comply with the IGRA standards. The Commission, however, is without any authority under IGRA to review *interim* contracts (*i.e.*, those contracts entered into between the passage of IGRA in 1988 and the operational date of the Commission in 1993) to ensure their compliance with IGRA; the reason for this, of course, is that the BIA had that authority pursuant to 25 U.S.C. 2709.

Thus, Congress carefully and clearly laid out the following scheme to ensure that all Indian gaming management contracts conformed to the standards of IGRA:

(i) From the date of enactment of IGRA until the Commission becomes operational, the Secretary (BIA) reviews and approves new management contracts in accordance with the IGRA requirements. 25 U.S.C. §§ 2709, 2711;

(ii) After the Commission becomes operational, it reviews and approves new management contracts in accordance with IGRA. 25 U.S.C. § 2711;

(iii) After the Commission becomes operational, it reviews and approves all extant pre-IGRA management contracts to ensure they comply with (or are brought into compliance with) the terms of IGRA. 25 U.S.C. § 2712(a), (c).

After the Commission becomes operational, then, all management contracts would have received Section 81 review and approval under the IGRA requirements. This scheme is entirely consistent with the Congressional findings and declaration of policy set forth in the statute.

3. The Court Of Appeals' Decision "Fractures" IGRA by Suspending for Over Four Years the Important Protections Provided By Congress to the Tribes

The court of appeals erroneously read the language of 25 U.S.C. § 2709 to mean that the standards Congress carefully crafted for the protection of Indian tribal gaming enterprises had no force or effect until the Commission became operational – over four years after Congress enacted those standards in IGRA. "Although casino management contracts were within the Bureau's authority under the old regime, we do not think the Bureau was required to exercise that authority in accordance with the substantive criteria of the new law." *Id.* at 10a. The court of appeals further held that the BIA

had no authority at all to review "collateral contracts," since such contracts were only subject to review under the new IGRA Section 81 standards and not, according to the court, under Section 81 as it existed prior to IGRA. *Id.* Thus, according to the court of appeals, *no* federal agency was charged by Congress with enforcement of IGRA standards for interim contracts, although the Commission was authorized to review pre-IGRA and post-Commission contracts. By the same token, under the court of appeals' view, citizens could not bring suit pursuant to Section 81 to force review and approval of collateral agreements.

Indeed, the court of appeals' decision means that management contractors could legally ignore the requirements of 25 U.S.C. § 2711 until the Commission became operational -- a period of over four years. A management contractor could have received fifty, sixty, or even ninety percent of net revenues from a tribal gaming operation, as long as it could manipulate tribal authorities into signing the contract. In the case at hand, the St. Croix Band of Chippewa Indians lost millions of dollars due to a contract that, in its entirety, gave seventy percent of the revenues to the owners of Buffalo Brothers Management, Inc.

The court of appeals complained that "[t]here is no ideal interpretive solution in this case," ostensibly because "[t]he statute is fractured... ." *Id.* at 12a. Under the scheme crafted by Congress, however, there is no "anomaly," and the statute is not "fractured." Rather, pursuant to Congress's intent, all Indian gaming management contracts were to receive review pursuant to the IGRA standards. The "anomolies" and "fractures" in the statute are the creation of the court of appeals, not the Congress.

B. The Court Of Appeals' Decision Violates The Federal Government's Trust Obligations To Indians And The Policy To Protect And Assist Indian Gaming Enterprises As Expressed In The Statute

Both IGRA and Section 81 were unquestionably enacted by Congress to protect and benefit Indians. 25 U.S.C. § 81 was "intended to protect the Indians from improvident and unconscionable contracts," and to "prevent them from being plundered." *Altheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803, 805 (7th Cir. 1993) (quoting *In re Sanborn*, 148 U.S. 222, 227 (1893) and Cong. Globe, 41st Cong., 3rd Sess. 1483 (1871)). Likewise, Congress enacted IGRA in part to ensure that monies generated from gaming operations on tribal lands primarily went to and benefitted the tribe, not outside managers. 25 U.S.C. § 2702(2).

This Court has long recognized that there is an "overriding duty of our Federal Government to deal fairly with Indians wherever located . . . ." *Morton v. Ruiz*, 415 U.S. 199, 236 (1974); *see, e.g., Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942); *Board of County Comm'rs v. Seber*, 318 U.S. 705, 715 (1943). Further, this Court has recognized that there is a "distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people." *Morton v. Ruiz*, 415 U.S. 199, 236 (1974) (quoting *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942)). The government, "[u]nder a humane and self imposed policy which has found expression in many acts of Congress and numerous decisions of this Court . . . has charged itself with moral obligations of the highest responsibility and trust." *Seminole Nation*, 316 U.S. at 296-97. Consistent with this philosophy, when Congress legislates

pursuant to its trust obligations towards Indian tribes, it is presumed that the legislation is intended to benefit the tribes. *See* Felix S. Cohen, Handbook of Indian Law, ch. 3, § C2b(2) (1982). Thus, IGRA should be liberally construed in favor of the tribe's interests. *Oneida Tribe of Indians v. State of Wisconsin*, 951 F.2d 757, 763 (7th Cir. 1991).

Congress anticipated that Indian gaming would become a significant revenue source for Indian tribes, and enacted IGRA to help provide standards to ensure that Indians were not manipulated and cheated out of revenues by management companies and others. 25 U.S.C. § 2702. During the gap created by the court of appeals' decision, the number of Indian tribes engaged in gaming continued to grow rapidly, as Congress expected, with over ninety tribal/state gaming compacts being reported in the Federal Register.[8/] The court of appeals' decision strips the protection Congress sought to give Indians in these gaming operations, which violates IGRA's purpose and the federal government's stated policy for Indian trust obligations. Here, the Tribe lost millions of dollars it would have received had the management contractor complied with the standards articulated by Congress in IGRA.

8/ These compacts were entered into pursuant to IGRA, 25 U.S.C. § 2710(d). Indeed, tribes, states and courts were applying the provisions of IGRA relating to tribal-state compact and tribal gaming ordinances throughout the interim period. *See, e.g. Spokane Indian Tribe v. United States*, 972 F.2d 1090 (9th Cir. 1992); *United States v. Cook*, 922 F.2d 1026 (2d Cir. 1991); *Ross v. Flandreau Santee Sioux Tribe*, 809 F. Supp. 738 (D.S.D. 1992).

C. The Court Of Appeals' Decision Contravenes The Entrusted Agency's Own Interpretation Of The Congressional Statute

The court of appeals states that one reason it concluded that the IGRA standards had no effect prior to the Commission's formation was because the BIA was not prepared to enforce those standards. App. 10a–11a. In fact, during the interim the BIA understood that it was to enforce the IGRA standards, and attempted to do so.

The interpretation of the agency charged with administering the statute is an important factor in determining the intent of Congress in enacting the statute. In *United States v. Clark*, 454 U.S. 555, 565 (1982), this Court stated that "although not determinative, the construction of a statute by those charged with its administration is entitled to great deference . . . ." Similarly, in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969), this Court held that an administrative interpretation should be followed "unless there are compelling indications that it is wrong . . . ."

In this case, the Secretary and the BIA understood that they were to apply the IGRA standards to Section 81 approvals of management contracts during the period of their interim authority under 25 U.S.C. § 2709. By memorandum dated August 1, 1990 to all BIA Area Directors, the office of the Secretary instructed the Area Directors that:

> Review and approval of Class II as well as Class III third-party management contracts remain with the Area Office. When reviewing such contracts, you are to use the Department's 1986 Bingo guidelines *as well as the Gaming Act.*

> However, where the Bingo guidelines conflict with the Gaming Act, *you are to follow the Gaming Act exclusively*. (emphasis added).

C.A.App.274.

Indeed, a report published by the Inspector General of the Department of the Interior in 1992 on the BIA's implementation of IGRA criticized the BIA in part because it had not been "diligent or timely in the establishment and execution of oversight arrangements required by the Act to monitor casino gambling and bingo games."[9/] In response, the BIA cited a lack of funding -- nowhere did it deny responsibility for enforcing IGRA when reviewing and approving contracts pursuant to Section 81. Although the court of appeals acknowledges that "the Bureau did tell its area directors to apply the criteria of the new Act," it dismisses this evidence of agency interpretation as "a simple directive." App. 11a. This failure to credit the interpretation of the administrative agency compounded the error by the court of appeals.

D. The Consequences Of The Gap Created By The Court Of Appeals' Decision Raise Serious Concerns For The On-Going Regulation Of Indian Gaming

The gap created by the court of appeals has serious consequences. Not only do the St. Croix Chippewa lose millions of dollars, all Indian parties to gaming contracts formed during the gap period are

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9/ There is no doubt that the survey report concerns itself with the interim period created by 25 U.S.C. § 2709. The survey notes that "[t]he National Indian Gaming Commission is not yet fully operational . . . ." C.A.App. 249.

without protection or recourse if the contracts were made in violation of IGRA standards. As the report by the Inspector General of the Department of the Interior confirms, many contracts entered into during the interim period did not comply with the IGRA standards. The court of appeals' decision will effectively remove all incentive to bring these violations to light, since the court has ruled that the protections of IGRA were nonexistent at the time.

1. The Gap Created by the Court of Appeals Allows Respondents To Escape IGRA Standards at the Expense of the Tribe

Under IGRA standards, the Buffalo Brothers' contract would be void. The law is well-established that contracts for the management of Indian gaming operations, such as the one at issue here, are contracts for "services for said Indians relative to their lands," and are therefore subject to the approval requirements set forth in Section 81. *Wisconsin Winnebago Business Committe v. Koberstein*, 762 F.2d 613, 618-19 (7th Cir. 1985); *United States ex rel. Shakopee Mdewakanton Sioux Community v. Pan American Management Co.*, 616 F. Supp. 1200, 1218 (D. Minn. 1985), *appeal dismissed*, 789 F.2d 632 (8th Cir. 1986). IGRA defines management contracts to include all collateral agreements. 25 U.S.C. § 2711(a) (3). Therefore, all collateral agreements that are part of the contract must be submitted to the BIA for approval.

Because the Interstate Lease Agreement was a collateral agreement to the Buffalo Brothers Management Agreement, it should have been submitted to the BIA for review and approval along with the Buffalo Brothers Management Agreement.

The entire management contract, including the collateral Interstate Lease Agreement, must receive Section 81 approval, or it is void. 25 U.S.C. §§ 81, 2711(a). The fact that the BIA reviewed and approved a portion of the management contract -- the Buffalo Brothers Management Agreement -- is meaningless. The entire management contract, as defined by the law, was not submitted and was *never* approved. Accordingly, the management contract, including all of its parts, is and always has been void.

Had the Interstate Lease Agreement been submitted with the Managment Agreement, IGRA would have required that they be rejected. According to IGRA, management contracts that allot management more than forty percent of net revenues of the Tribe's gaming operation are not allowed. 25 U.S.C. § 2711(c)(1),(2). The Management Agreement at issue here, when all of the appropriate collateral agreements are included, gave almost seventy percent of the net revenues to management.

Had the contract been required to meet IGRA's minimum standards, the Tribe would have received millions of dollars more than it did. Instead, the court of appeals' decision that IGRA standards did not apply means that, although expressly contrary to the statute, Buffalo Brothers Management, Inc.'s siphoning off of seventy percent of the profits was legal.

2. The Court Of Appeals' Decision Permanently Isolates Gap-Period Contracts From IGRA Standards

The report issued by the Inspector General of the Department of the Interior in December of 1992 (during the gap period) states that "besides the lack of many tribal-state compacts and approved management

contracts, there are many more unapproved equipment leasing, supply and service contracts." C.A.App. 245. The report goes on to state that "[i]n addition to the unapproved contracts and compacts, we believe that many of the approved contracts *do not comply with those provisions of the Act that require the tribes to receive primary benefit from the gaming operation. C.A.App. 245-246 (emphasis added).*

In short, the Department of the Interior concluded that many of the management contracts approved during the gap period do not meet the IGRA standards, and therefore threaten to deprive the tribes of the primary benefit of their gaming operations. The decision by the court of appeals means that all of these affected tribes have no recourse, and must simply live with these burdensome contracts. The court of appeals' decision completely removes any incentive even to bring these problems to light.10/ Thus, the court of appeals' decision permanently isolates this group of contracts from IGRA standards. Congress intended to protect tribes by passing IGRA. Instead, the court of appeals' decision protects all management contractors currently operating under gap contracts which do not comply with IGRA.

10/ The decision that IGRA standards did not apply during the gap period is not remediable. Although the Commission is required to use IGRA standards in approving gaming contracts, and is required to bring gaming contracts approved before IGRA was enacted into line with IGRA standards, it is not empowered to re-open contracts created during this gap period. Likewise, private citizens have no incentive to bring suit under Section 81 to recover monies received by contractors pursuant to gap contracts which do not comply with IGRA.

CONCLUSION

The petition for a writ of certiorari should be granted.

June 29, 1994

Respectfully submitted,

Michael J. Wahoske
Counsel of Record
Steven J. Wells
Michael E. Florey
Mark A. Jarboe
James E. Townsend
DORSEY & WHITNEY
220 South Sixth Street
Minneapolis, MN 55402
Telephone: (612) 340-2600

Attorneys for Petitioners

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 93-3193

UNITED STATES EX REL. KENNETH MOSAY, *et al.*

Plaintiffs-Appellants,

v.

BUFFALO BROTHERS MANAGEMENT INCORPORATED; INTERSTATE GAMING SERVICES, INCORPORATED; ROY C. PALMER; and RONALD G. BROWN,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Wisconsin.
No. 92 C 925S - John C. Shabaz, *Judge.*

Argued February 9, 1994 - Decided March 31, 1994

Before POSNER, *Chief Judge*, BAUER, *Circuit Judge*, and NORGLE, *District Judge*[1/]

1/ Hon. Charles R. Norgle Sr. of the Northern District of Illinois, sitting by designation.

Posner, *Chief Judge*. The plaintiffs, three members of the St. Croix Band of Chippewa Indians, appeal from the dismissal of the defendants' motion for summary judgment of their suit to void a contract between the defendants and the St. Croix Band and to recover on behalf of the tribe all the money the defendants have received from the tribe under the contract. The suit was filed in 1992 under 25 U.S.C. § 81, which imposes various requirements on contracts with Indian tribes that involve payment "in consideration of services for . . . Indians relative to their lands." The most important requirement is that such contracts be approved by the Bureau of Indian Affairs in the Department of the Interior. The statute authorizes the bringing of suits in the name of the United States to recover all money paid under contracts that violate the statute, with one half of the recovery going to the United States in trust for the tribe and the other half to the person bringing the suit. The statute does not specify who is eligible to bring such a suit - if the statute is read literally, anyone in the world is. Nor does it set forth standards to guide the Bureau of Indian Affairs in deciding whether to approve a contract.

The operation of gambling casinos on Indian reservations is a growing source of income for the tribes. Until 1988 (and perhaps for some period afterward, as we shall see), contracts between the tribes and the firms that actually operate the casinos, like all other contracts with Indian tribes relating to Indian lands (as these casino management contracts were held to be), were required by 25 U.S.C. § 81 to be approved by the Bureau of Indian Affairs. Congress that year enacted the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 *et seq.*, which establishes a three-member independent agency within the Department of the Interior - the National Indian

Gaming Commission - to supervise Indian gambling. The Act confers on the Commission (or in some instances on the Chairman of the Commission, but we can ignore that complication) comprehensive authority over tribal ordinances or resolutions authorizing gambling and over contracts made by the tribes for the operation or management of their gambling establishments. Of particular relevance to this case, the Commission may not approve management contracts that do not satisfy a number of specific statutory criteria, § 2711; and "management contract" is defined to include "all collateral agreements to such contract that relate to the gaming activity." § 2711(a)(3). The authority heretofore exercised by the Bureau of Indian Affairs under 25 U.S.C. § 81 with regard to Indian gambling contracts "is hereby transferred to the Commission," § 2711(h), which is further authorized to levy and collect civil fines of up to $25,000 for any violations of the Act, regulations issued under it, or tribal ordinances or resolutions approved under it. § 2713(a)(1). In addition the Commission is required to review all management contracts and tribal ordinances and resolutions (relating to gambling) adopted prior to October 17, 1988, the day the Act was passed, and to bring them into conformity with the Act by ordering them modified appropriately. § 2712.

Congress must have anticipated *some* delay in the formation of the new National Indian Gaming Commission, for the Act provides that "until such time as the Commission is organized and prescribes regulations," the Bureau of Indian Affairs "shall continue to exercise those authorities vested in [it] on the day before October 17, 1988." § 2709. But they probably did not anticipate that it would be almost five years before the Commission was up and running. In

the interim the St. Croix Band signed two contracts with the defendants. The first was a contract with defendant Interstate to lease slot machines, the second a contract with defendant Buffalo Brothers under which the latter would manage the band's casino, which is located at Turtle Lake, Wisconsin. Both corporations are controlled by the two individual defendants, Palmer and Brown. The management contract was submitted to the Bureau of Indian Affairs, which approved it; whether in doing so the Bureau applied the criteria for approval established by the Indian Gaming Regulatory Act is unclear, although the contract recites that it is being made "pursuant to" that Act and the Bureau official who actually approved it said that his superiors had told him to use the Act's criteria and that he had done so. The other contract, the slot-machine lease, was not submitted to the Bureau because it is not a contract for services "relative to [Indian] lands" as that term has been interpreted in cases under 25 U.S.C. § 81. It does not cede control over Indian lands to Interstate or even (what would be a kind of negative control) forbid the tribe to mortgage its lands. *Altheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803, 811-12 (7th Cir. 1993); *Wisconsin Winnebago Business Committee v. Koberstein*, 762 F.2d 613, 619 (7th Cir. 1985); *Barona Group v. American Management & Amusement, Inc.*, 840 F.2d 1394, 1403-04 (9th Cir. 1988).

After the approval of the management contract, the casino was built with a substantial investment by Buffalo Brothers and is operating successfully, though the plaintiffs do not believe the tribe is getting its fair share of the profits. They argue that even though the National Indian Gaming Commission was not yet operational when the contracts were signed, the Indian Gaming Regulatory Act was fully applicable to them.

The slot-machine lease, being a collateral agreement within the meaning of the Act, should therefore have been submitted to the Bureau of Indian Affairs for approval. They argue that since it was not, the management contract, which was submitted, was incomplete and so should not have been approved. They conclude that both contracts are void and that all the money that the defendants have received under them should be recovered in this suit and divided equally between the United States and the plaintiffs. The tribe itself apparently is content with the contracts. At all events it has dissociated itself from the suit, although the complaint is captioned as being filed "on behalf of the St. Croix Band of Chippewa Indians" and the plaintiffs have assigned in advance any recovery they may obtain in this suit, minus attorney's fees, to the tribe, while the statute itself requires that the share of the recovery going to the United States be held for the use of the tribe. We shall not have to determine whether the contracts are in fact disadvantageous to the tribe.

The principal issue is whether 25 U.S.C. § 81 provides a remedy for violations of the Indian Gaming Regulatory Act, either generally or until the National Indian Gaming Commission went into operation, five years after the Act was passed. But there is a threshold issue of the plaintiffs' standing. Section 81 is a "qui tam" or, less politely, a bounty hunter's statute: it authorizes any person to sue to declare an Indian contract void and if he succeeds to be rewarded with half the money that the contractor had received under the contract. There is a question, unnecessary to decide in this case, whether Article III of the Constitution permits a federal court to entertain a qui tam suit brought by someone whose only stake in the suit is the bounty. It is

one thing for Congress to offer bounties to law enforcers; that is little different from having salaried police and prosecutors. The offer of a bounty as of [sic] a salary can create an entitlement upon which a suit in federal court can be based without violation of Article III, *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2143 (1992), since one deprived of a statutory right to a bounty has suffered the kind of injury that is a traditional basis for seeking legal redress. It is another thing for Congress to provide that anyone in the United States can sue to enforce the rights of anyone else. For those anyones who are suing to enforce the rights of others are by hypothesis persons who have not been injured themselves, and without an injury to oneself (or one's members, if one is a membership organization) one has no standing to sue. *Id.* at 2137-38; *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 473 (1982). There is no standing to sue to redress injuries purely to another. *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979); *Village of Bellwood v. Dwivedi*, 895 F.2d 1521, 1526 (7th Cir. 1990).

If the government can be said to own, or hold in trust, the rights that 25 U.S.C. § 81 confers on Indians, then by analogy to qui tam actions under the False Claims Act, most recently *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743 (9th Cir. 1993), the plaintiff in a qui tam action under section 81, whoever he was, could be thought an assignee of the federal government, rather than an interloper stepping on the toes of the rights holder. Comment, "The Standing of Qui Tam Relators Under the False Claims Act," 57 *U. Chi. L. Rev.* 543, 563-70 (1990); cf. *United States ex rel. Milam v. University of Texas*, 961 F.2d 46, 49 (4th Cir. 1992). Until recently, Indians generally were not allowed to sue

without the consent or participation of the federal government; and the money recovered in the qui tam suit goes to the United States (and the plaintiff) rather than to the Indians directly. In effect the government's share of the recovery is to be held in trust for the Indians - and a trustee is the one who has the legal right to sue, not the beneficiary - while the plaintiff's share could be thought compensation for generating a fund for the ultimate benefit of the tribe.

We need not try to resolve in this case the general issue of standing in cases under section 81. The plaintiffs in this case are not just anyone. As "enrolled" members of the St. Croix Band they have a legally enforceable right to share in the profits from the use of the tribe's land. That at least is the general rule of tribal Indian law, *Felix S. Cohen's Handbook of Federal Indian Law*, ch. 11 (1982 ed.), and no one questions its applicability to this case. If the plaintiffs are correct that the contracts the band signed with the defendants yield less income to the band than would lawful contracts not marred by what the plaintiffs describe as self-dealing by Messrs. Palmer and Brown, this suit if successful will put money in the plaintiffs' pockets over and above what they would receive from the judgment itself. So they have the kind of stake that will support a traditional lawsuit. The requirements of Article III are satisfied.

There is a distinct question whether the plaintiffs should be authorized to maintain this suit in the teeth of the band's tribal council, of which two of the plaintiffs are former, but not present, members. Functionally this is a derivative suit, in which disgruntled "shareholders" (a pretty exact description of the relation of the tribe's members to the tribe) seek to maintain a suit on behalf

of their "corporation" (the tribe) whose "board of directors" (the tribal council) wrongfully refuses to authorize it, against a third party (the defendant contractors). The general rule is that a derivative suit can be maintained only if the shareholders can show that the board of directors in fact acted wrongfully in refusing to bring the suit. E.g., *Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 530-32 (1984); *Campfire Land Co. v. Jolin*, 198 N.W.2d 593, 597 (Wis. 1972); Fed. R. Civ. P. 23.1. Without such a requirement, the shareholders would be able to bypass the board of directors, undermining its authority. In just the same fashion the plaintiffs are trying to undermine the tribal council's authority. For while obviously dissatisfied with the council's decision to stick by the defendants, they have not attempted to show that the decision is not a bona fide business judgment of the council.

We leave for a future day the question, not adequately developed by the parties, whether some such requirement should be grafted onto 25 U.S.C. § 81 by judicial interpretation. (We are being deliberately vague. The requirement might well differ from the business judgment rule applied to ordinary corporations, given the paternalistic premise of section 81 - that Indians do not have a full capacity to make contracts. See Cong. Globe, 41st Cong., 3d Sess. 1484-86 (1871).) We do not think the plaintiffs have a remedy under that statute in any event. When section 81 is read in conjunction with the Indian Gaming Regulatory Act, two distinct, successive regulatory regimes can be seen. One is administered by the Bureau of Indian Affairs under section 81, the other by the National Indian Gaming Commission under the Indian Gaming Regulatory Act. In the first regime, contracts relating to Indian lands, including casino management contracts,

must be submitted to the Bureau for approval under criteria undefined by statute or regulation; failure to submit exposes the contractor to the fell sanction of a qui tam suit. In the second regime, a class of contracts - casino management contracts - are carved out of section 81 and subjected to the exclusive regulatory authority of the new Commission administering the new Act, along with certain contracts - contracts collateral to casino management contracts - that never were subject to section 81. 25 U.S.C. § 2711(a)(3); 25 C.F.R. § 502.5. Violations of the Act, including failure to submit contracts required to be submitted to the Commission for approval, subject the violator to civil penalties levied and collected by the Commission in proceedings authorized by the Act.

We doubt that the qui tam provision of section 81 remains applicable to contracts now governed by the Indian Gaming Regulatory Act. Contractors would be subject to enormous legal risk that one of their contracts with an Indian tribe might be held to be a collateral agreement that they should have but failed to file, in which event they would have to repay everything they had received under the contract. Qui tam liability would expand indefinitely at the very moment that Congress had created a new administrative remedy and vested its enforcement in a new, specialized agency with its own detailed, measured, modern set of remedies.

But even if this is wrong, we do not think that qui tam liability for failure to comply with the new statutory standards existed during that period of limbo in which because the new Commission, while formally "established" by the new Act, was not operating, contractors such as the defendants had to submit their proposed contracts to the Bureau of Indian Affairs, the

enforcement agency under the old regime. Since section 81 specifies no criteria for the Bureau's approval of contracts within the statute's scope, we suppose the Bureau could if it wanted use the criteria in the new law; and in fact that is what it told its area directors, to whom it delegated the power of approval, to do. But it had no power to do that with regard to the slot-machine lease, which was not within the scope of section 81. We read "shall continue to exercise those authorities vested in" the Bureau on the day before the Indian Gaming Regulatory Act became law until the new Commission was up and running, 25 U.S.C. § 2709, as a direction that the old regime would continue until that happened. That lets out the slot-machine lease, and we are not impressed by the plaintiffs' argument that it comes right back in through the back door on the theory that without the lease before him the area director did not have the full picture and thus could not evaluate the management contract. The regulation of "collateral agreements" was not within the authority of the Bureau of Indian Affairs under section 81; they are not agreements relating to Indian lands; and so heavy a forfeiture as decreed by section 81 should not be founded on an argument however ingenious that agreements that were not required to be submitted because they did not relate to Indian lands within the meaning of the statute had to be submitted anyway.

Although casino management contracts were within the Bureau's authority under the old regime, we do not think the Bureau was required to exercise that authority in accordance with the substantive criteria of the new law. That would have been a recipe for regulatory paralysis. The Bureau of Indian Affairs would have had to equip itself to administer the detailed and comprehensive regulatory scheme for such

contracts established by the new Act, and while it was doing so no contracts would be approved. In all likelihood by the time the Bureau was geared up and ready to begin processing applications under the new standards the new Commission would become operational, rendering all the preparatory efforts of the Bureau wasted. In retrospect we know that the investment in gearing up the Bureau to enforce the new statute would not have been completely wasted, because it took five years to organize the Commission; but such a delay could not have been foreseen. And although the Bureau did tell its area directors to apply the criteria of the new Act and in that sense did gear up to enforce it albeit indirectly, that simple directive is all that we have seen. It has not been suggested that the Bureau attempted during the long interim before the new Commission was functional to establish a parallel administrative apparatus or promulgate necessary regulations.

Section 2711 of the Indian Gaming Regulatory Act, which regulates casino management contracts, is addressed to the Commission. It requires the Commission to do this, do that, approve this, approve that, charge contractors a fee to cover the costs of this or that, and so forth. It presupposes a Commission. Realizing that the Commission would not spring magically into existence with the touch of the congressional wand on October 17, 1988, Congress preserved the old system of regulation until such time as the Commission did come into existence. Cf. *Nationwide Building Maintenance, Inc. v. Reich*, 14 F.3d 1102, 1103-04 (6th Cir. 1994). Such at all events is our interpretation of section 2709, the interim authority provision. It creates, we acknowledge, an anomaly: while the new Commission is required by section 2712

to reopen all contracts approved under the old regime before the date of the new Act, it is not required to reopen any contracts approved under the old regime between the date of the new Act and the date - five years later - when the Commission was finally up and running. The anomaly is mitigated by the fact that the Commission has adopted a regulation declaring that is reserves the right to reopen those contracts even through not required to do so by the Act. 25 C.F.R. § 533.2. But the validity of the regulation has not been adjudicated.

There is no ideal interpretative solution in this case. The statute is fractured, because it fails to make express provision for the possibility of a long delay in the formation of the regulatory authority. But we think the best - both the truest and the most practical - interpretation is that the regulatory scheme created by the Act did not take effect until the regulatory authority ordained to administer it came into existence. There was not until then a regulatory void; the preexisting regulatory regime, administered by the Bureau of Indian Affairs, remained in effect. The management contract was properly approved in that regime, and the other contract was not subject to the regime at all. As a result, there was no violation of 25 U.S.C. § 81. And the pertinent provisions of the Indian Gaming Regulatory Act, provisions enforceable in our view only by the National Indian Gaming Commission, were not yet in effect because the Commission was not yet in operation; so there was no violation of that statute either. The lawsuit was properly dismissed.

AFFIRMED.

A true Copy:

Teste:

_____

Clerk of the United States Court of
Appeals for the Seventh Circuit

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

No. 92-C-925-S

UNITED STATES ex rel.
KENNETH MOSAY, MARY WASHINGTON
and ARCHIE MOSAY,
and
KENNETH MOSAY, MARY WASHINGTON,
and ARCHIE MOSAY, individually
and on behalf of the St. Croix Band
of Chippewa Indians,

Plaintiffs,

v.

BUFFALO BROTHERS MANAGEMENT,
INC., an Illinois corporation;
INTERSTATE GAMING SERVICES, INC.,
an Illinois corporation; ROY C. PALMER
and RONALD G. BROWN,

Defendants.

Plaintiffs Kenneth Mosay, Mary Washington and Archie Mosay commenced this action pursuant to 25 U.S.C. § 81 seeking to void a casino management contract between the St. Croix Band of Chippewa

Indians and the defendant Buffalo Brothers Management, Inc. The Court has jurisdiction pursuant to 28 U.S.C. § 1331. The matter is presently before the Court on cross motions for summary judgment. The following are the relevant facts which are undisputed for purposes of the pending motions.

FACTS

The St. Croix Band of Chippewa Indians is a federally recognized Indian Tribe residing on lands within the State of Wisconsin. Plaintiffs Kenneth Mosay, Mary Washington and Archie Mosay are enrolled members of the Tribe.

Defendant Interstate Gaming Services, Inc. is an Illinois corporation which was formed on or about December 1989. Defendant Interstate is in the business of leasing gaming equipment to Native American Tribes. It is not in the business of performing management services and has never managed a gaming operation. The sole shareholders of Interstate are defendants Roy C. Palmer and Ronald G. Brown. Defendant Palmer was at all relevant times a corporate director and secretary of Interstate. Defendant Brown was at all relevant times a corporate director and president of Interstate.

In the summer of 1989 defendant Brown met with members of the Tribe, including plaintiff Kenneth Mosay, to bid on the supplying of video games to the Tribe. The Tribe chose to accept the bid of defendant Interstate which began supplying gaming machines to the Tribe in 1989. On January 23, 1991 the Tribe and defendant Interstate entered into an equipment lease agreement under which Interstate would have the

exclusive right to lease and maintain Class II and III video games on the Tribe's lands. The lease agreement was for a term of five years beginning February 1, 1991. The lease provided that the lessor was to receive a certain percentage of the proceeds from the machines during the term of the lease.

Defendant Buffalo Brothers Management, Inc. is an Illinois corporation formed in 1991. It is also owned by defendants Palmer and Brown who are directors and hold the positions of president and secretary. Since its formation defendant Buffalo Brothers' activities have been limited to the management of the Tribe's casinos at Turtle Lake and Danbury, Wisconsin.

In August 1991 defendant Palmer appeared before the Tribal Council and proposed that defendant Buffalo Brothers provide management services and capital for the Tribal casinos at Turtle Lake and Danbury. Other parties also appeared before the Tribal Council and offered proposals for such services and capital. On August 28, 1991 defendant Buffalo Brothers entered into a management agreement with the Tribe pursuant to which Buffalo Brothers would have the exclusive right to develop, manage, operate and maintain the gaming facility owned by the Tribe. The management agreement was submitted to the Bureau of Indian Affairs for approval pursuant to 25 U.S.C. § 81, and was approved by Area Director, Dr. Earl J. Barlow on January 28, 1992.

The Interstate Lease Agreement was neither submitted for approval to the BIA nor submitted or considered as part of the approval of the management agreement.

MEMORANDUM

It is plaintiffs' position that the management agreement was never properly approved within the meaning of 25 U.S.C. § 81. More specifically, plaintiffs contend that no effective § 81 approval of the management contract could have been provided without consideration by the BIA of the preexisting interstate lease agreement. Defendants assert that no consideration of the lease agreement was necessary for approval of the management agreement and that the lease is unrelated to the approved agreement.

Summary judgment is appropriate when, after both parties have the opportunity to submit evidence in support of their respective positions and the Court has reviewed such evidence in the light most favorable to the nonmovant, there remains no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), Federal Rules of Civil Procedure. A fact is material only if it might affect the outcome of the suit under the governing law. Disputes over unnecessary or irrelevant facts will not preclude summary judgment. A factual issue is genuine only if the evidence is such that a reasonable factfinder could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby. Inc.*, 477 U.S. 242, 248 (1986).

In support of their position plaintiffs rely extensively upon the Indian Gaming Regulatory Act, 25 U.S.C. § 2701, *et seq.* (1988) "IGRA" and regulations adopted thereunder. The following excerpt from IGRA forms the basis for plaintiffs' position:

> § 2711(a)(3) For purposes of this Act, any reference to the management contract described in paragraph (1) shall be considered to include all collateral agreements to such contract that relate to the gaming activity.

25 C.F.R. § 502.5, promulgated by the National Indian Gaming Commission pursuant to IGRA provides the following definition of "collateral agreement:"

> Collateral agreement means any contract, whether or not in writing, that is related, either directly or indirectly, to a management contract, or to any rights, duties or obligations created between a tribe (or any of its members, entities, or organizations) and a management contractor or subcontractor (or any person related to a management contractor or subcontractor).

Relying upon IGRA's definition of "management contract" and the broad definition of "collateral agreement" contained in the regulations, plaintiffs argue that the § 81 approval of the management agreement was ineffective because the approval process did not include consideration of the lease agreement. The threshold issue before the Court is whether IGRA's definition of "management agreement" and the accompanying regulations apply to approval under § 81.

Applicability of IGRA

Based upon the language of IGRA and the relationship between § 81 and IGRA, the Court finds the IGRA definitions inapplicable to the management agreement approval determination provided by the Secretary of the Interior pursuant to § 81.

The management agreement was approved pursuant to interim authority granted by 25 U.S.C. § 2709, which provides as follows:

> Notwithstanding any other provision of this Act, the Secretary shall continue to exercise those authorities vested in the Secretary on the day before the enactment of this Act relating to supervision of Indian gaming until such time as the Commission is organized and prescribes regulations. The Secretary shall provide staff and support assistance to facilitate an orderly transition to regulation of Indian gaming by the Commission.

A plain reading of this statute makes all provisions of IGRA and the regulations adopted under IGRA inapplicable to an interim management contract approval here involved. The clear intent of the statute is to maintain the existing process as if IGRA had not been enacted.

Common sense supports such an interpretation and result. In this case the regulations upon which plaintiffs rely were enacted after the management

contract was approved by the Secretary. It would be anomalous to require the Secretary to consider regulations which were not in existence. Accordingly, Congress chose to delay the impact of IGRA and its regulations until such time as the Commission was organized and all regulations were in place. Consistent with this scheme Congress provided at 25 U.S.C. § 2712 that the Commission would review previously approved contracts under the more exacting standards of IGRA after the organization of the Commission. It is apparent that the statutory scheme did not contemplate the use of IGRA's provisions and regulations by the Secretary while the Secretary was exercising the interim authority of § 2709.

Furthermore, there is nothing in IGRA to indicate it was intended to expand the definition of "agreement" as used in § 81 or to in any way affect the private cause of action presently pursued by the plaintiffs. IGRA unquestionably regulates Indian gaming more extensively and in greater detail than does § 81. Although IGRA transferred § 81 authority to the Commission, 25 U.S.C. § 2711(h), it did not expand the scope of § 81 or the private cause of action thereunder.

Accordingly, plaintiffs cannot rely upon IGRA's provisions or regulations adopted thereunder in their effort to attack the approval process used by the Secretary under § 81. The issue, correctly framed, is whether the approval of the management contract complied with the requirements of § 81.

Approval under § 81

Section 81 provides in relevant part:

> No agreement shall be made by any person with any tribe of Indians . . . in consideration of services for said Indians relative to their lands . . . unless such contract or agreement be executed and approved as follows . . . Any contracts or agreements made in violation of this section shall be null and void, and all money or other thing of value paid to any person on behalf of any Indian or tribe . . . may be recovered by suit in the name of the United States.

It is conceded by plaintiffs that the Interstate lease is not an agreement relating to Indian lands which requires independent approval under § 81. *See Altheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803, 810-811 (7th Cir. 1993). Accordingly, there is no question that the lease agreement was enforceable and properly in effect beginning in January 1991. Plaintiffs' sole challenge to the lease is based upon its relationship to the management agreement.

There is nothing in the language of § 81 or the cases interpreting it which requires consideration of independent "collateral" agreements not affecting Indian lands in connection with the approval of an agreement which is relative to Indian lands. Accordingly, the failure of the Secretary to consider the lease could be fatal to the approval of the management agreement only if the lease might be deemed part of the management agreement which required approval. Under traditional contract analysis:

> The general rule is that in the absence of anything to indicate a contrary intention, instruments executed at the same time, by the same contracting parties, for the same purpose, and in the course of the same transaction will be considered and construed together, since they are, in the eyes of the law, one contract or instrument.

James Talcott. Inc. v. P & J Contracting Co., 27 Wis. 2d 68, 76, 133 N.W.2d 473 (1965) (quoting 17 Am. Jur. (2d) Contracts, p. 668, § 264). Similarly, where a written contract refers to another instrument incorporating its terms by reference the two may be viewed as one contract. 17A Am. Jur. (2d) Contracts p. 426, § 400 (1991).

The undisputed facts in this case establish none of the elements which would permit two agreements to be considered as a single contract. The agreements were not executed contemporaneously. In fact, the lease agreement was independently entered into nearly a year earlier and the parties were performing thereunder prior to any negotiations concerning the management agreement. The contracting parties are not identical, the two non-tribal parties to the contracts being distinct, though related, corporate entities. The transactions, while related to Indian gaming, relate to separate aspects of the enterprise which could readily be provided independently by separate parties.

Furthermore, plaintiffs point to no language in either of the agreements which makes them dependent upon each other. To the contrary, it appears that the parties consciously entered into agreements which

would be entirely independent of one another and to further that purpose created separate entities to act as contracting parties. There is no basis for finding that the lease and management agreements constitute a single agreement which would require approval as a whole by the Secretary pursuant to § 81.

Accordingly, the Court finds that any review of the lease agreement which may be required by IGRA is pursuant to 25 U.S.C. § 2712. Meanwhile, the approval by the Secretary of the management agreement remains in effect until such time as it may be disapproved by the Chairman of the Indian Gaming Regulatory Commission. 25 C.F.R. § 533.1(c).

ORDER

IT IS ORDERED that plaintiffs' motion for summary judgment is DENIED.

IT IS FURTHER ORDERED that defendants' motion for summary judgment is GRANTED.

IT IS FURTHER ORDERED that judgment be entered in favor of the defendants against the plaintiffs DISMISSING plaintiffs' complaint and all claims contained therein with prejudice and costs.

Entered this 17th day of August, 1993.

BY THE COURT:

JOHN C. SHABAZ
District Judge

APPENDIX C

TITLE 25 - INDIANS

* * *

SUBCHAPTER II - CONTRACTS WITH INDIANS

§ 81. Contracts with Indian Tribes or Indians

No agreement shall be made by any person with any tribe of Indians, or individual Indians not citizens of the United States for the payment or delivery of any money or other thing of value, in present or in prospective, or for the granting or procuring any privilege to him, or any other person in consideration of services for said Indians relative to their lands, or to any claims growing out of, or in reference to, annuities, installments, or other moneys, claims, demands, or thing, under laws or treaties with the United States, or official acts of any officers thereof, or in any way connected with or due from the United States, unless such contract or agreement be executed and approved as follows:

First. Such agreement shall be in writing, and a duplicate of it delivered to each party.

Second. It shall bear the approval of the Secretary of the Interior and the Commissioner of Indian Affairs indorsed upon it.

Third. It shall contain the names of all parties in interest, their residence and occupations; and if made with a tribe, by their tribal authorities, the scope of

authority and the reason for exercising that authority, shall be given specifically.

Fourth. It shall state the time when and place where made, the particular purpose for which made, the special thing or things to be done under it, and, if for the collection of money, the basis of the claim, the source from which it is to be collected, the disposition to be made of it when collected, the amount or rate per centum of the fee in all cases; and if any contingent matter or condition constitutes a part of the contract or agreement, it shall be specifically set forth.

Fifth. It shall have a fixed limited time to run, which shall be distinctly stated.

All contracts or agreements made in violation of this section shall be null and void, and all money or other thing of value paid to any person by any Indian or tribe, or any one else, for or on his or their behalf, on account of such services, in excess of the amount approved by the Commissioner and Secretary for such services, may be recovered by suit in the name of the United States in any court of the United States, regardless of the amount in controversy; and one-half thereof shall be paid to the person suing for the same, and the other half shall be paid into the Treasury for the use of the Indian or tribe by or for whom it was so paid.

(R.S. § 2103; Pub. L. 85-770, Aug. 27, 1958, 72 Stat. 927.)

* * *

§ 2701. Findings

The Congress finds that -

(1) numerous Indian tribes have become engaged in or have licensed gaming activities on Indian lands as a means of generating tribal governmental revenue;

(2) Federal courts have held that section 81 of this title requires Secretarial review of management contracts dealing with Indian gaming, but does not provide standards for approval of such contracts;

(3) existing Federal law does not provide clear standards or regulations for the conduct of gaming on Indian lands;

(4) a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government; and

(5) Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity.

(Pub. L. 100-497, § 2, Oct. 17, 1988, 102 Stat. 2467)

§ 2702. Declaration of policy

The purpose of this chapter is -

(1) to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments;

(2) to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players; and

(3) to declare that the establishment of independent Federal regulatory authority for gaming on Indian lands, the establishment of Federal standards for gaming on Indian lands, and the establishment of a National Indian Gaming Commission are necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue.

(Pub. L. 100-497, § 3, Oct. 17, 1988, 102 Stat. 2467)

* * *

§ 2709. Interim authority to regulate gaming

Notwithstanding any other provision of this chapter, the Secretary shall continue to exercise those authorities vested in the Secretary on the day before October 17, 1988, relating to supervision of Indian gaming until such time as the Commission is organized and prescribes regulations. The Secretary shall provide staff and support assistance to facilitate an orderly transition to regulation of Indian gaming by the Commission.

(Pub. L. 100-497, § 10, Oct. 17, 1988, 102 Stat. 2472)

* * *

§ 2711. Management contracts

(a) Class II gaming activity; information on operators

(1) Subject to the approval of the Chairman, an Indian tribe may enter into a management contract for the operation and management of a class II gaming activity that the Indian tribe may engage in under section 2710(b)(1) of this title, but, before approving such contract, the Chairman shall require and obtain the following information:

(A) The name, address, and other additional pertinent background information on each person or entity (including individuals comprising such entity) having a direct financial interest in, or management responsibility for, such contract, and, in the case of a corporation, those individuals who serve on the board of directors of such corporation and each of its stockholders who hold (directly or indirectly) 10 percent or more of its issued and outstanding stock;

(B) a description of any previous experience that each person listed pursuant to subparagraph (A) has had with other gaming contracts with Indian tribes or with the gaming industry generally, including specifically the name and address of any licensing or regulatory

agency with which such person has had a contract relating to gaming; and

(C) a complete financial statement of each person listed pursuant to subparagraph (A).

(2) Any person listed pursuant to paragraph (1)(A) shall be required to respond to such written or oral questions that the Chairman may propound in accordance with his responsibilities under this section.

(3) For purposes of this chapter, any reference to the management contract described in paragraph (1) shall be considered to include all collateral agreements to such contract that relate to the gaming activity.

(b) **Approval**

The Chairman may approve any management contract entered into pursuant to this section only if he determines that it provides at least-

(1) for adequate accounting procedures that are maintained, and for verifiable financial reports that are prepared, by or for the tribal governing body on a monthly basis;

(2) for access to the daily operations of the gaming to appropriate tribal officials who shall also have a right to verify the daily gross revenues and income made from any such tribal gaming activity;

(3) for a minimum guaranteed payment to the Indian tribe that has preference over the retirement of development and construction costs;

(4) for an agreed ceiling for the repayment of development and construction costs;

(5) for a contract term not to exceed five years, except that, upon the request of an Indian tribe, the Chairman may authorize a contract term that exceeds five years but does not exceed seven years if the Chairman is satisfied that the capital investment required, and the income projections, for the particular gaming activity require the additional time; and

(6) for grounds and mechanisms for terminating such contract, but actual contract termination shall not require the approval of the Commission.

(c) **Fee based on percentage of net revenues**

(1) The Chairman may approve a management contract providing for a fee based upon a percentage of the net revenues of a tribal gaming activity if the Chairman determines that such percentage fee is reasonable in light of surrounding circumstances. Except as otherwise provided in this subsection, such fee shall not exceed 30 percent of the net revenues.

(2) Upon the request of an Indian tribe, the Chairman may approve a management contract providing for a fee based upon a percentage of the net revenues of a tribal gaming activity that exceeds 30 percent but not 40 percent of the net revenues if the Chairman is satisfied that the capital investment required, and income projections, for such tribal gaming

activity require the additional fee requested by the Indian tribe.

(d) Period for approval; extension

By no later than the date that is 180 days after the date on which a management contract is submitted to the Chairman for approval, the Chairman shall approve or disapprove such contract on its merits. The Chairman may extend the 180-day period by not more than 90 days if the Chairman notifies the Indian tribe in writing of the reason for the extension. The Indian tribe may bring an action in a United States district court to compel action by the Chairman if a contract has not been approved or disapproved within the period required by this subsection.

(e) Disapproval

The Chairman shall not approve any contract if the Chairman determines that -

(1) any person listed pursuant to subsection (a)(1)(A) of this section -

(A) is an elected member of the governing body of the Indian tribe which is the party to the management contract;

(B) has been or subsequently is convicted of any felony or gaming offense;

(C) has knowingly and willfully provided materially important

false statements or information to the Commission or the Indian tribe pursuant to this chapter or has refused to respond to questions propounded pursuant to subsection (a)(2) of this section; or

(D) has been determined to be a person whose prior activities, criminal record if any, or reputation, habits, and associations pose a threat to the public interest or to the effective regulation and control of gaming, or create or enhance the dangers of unsuitable, unfair, or illegal practices, methods, and activities in the conduct of gaming or the carrying on of the business and financial arrangements incidental thereto;

(2) the management contractor has, or has attempted to, unduly interfere or influence for its gain or advantage any decision or process of tribal government relating to the gaming activity;

(3) the management contractor has deliberately or substantially failed to comply with the terms of the management contract or the tribal gaming ordinance or resolution adopted and approved pursuant to this chapter; or

(4) a trustee, exercising the skill and diligence that a trustee is commonly held to, would not approve the contract.

(f) Modification or voiding

The Chairman, after notice and hearing, shall have the authority to require appropriate contract modifications or may void any contract if he subsequently determines that any of the provisions of this section have been violated.

(g) Interest in land

No management contract for the operation and management of a gaming activity regulated by this chapter shall transfer or, in any other manner, convey any interest in land or other real property, unless specific statutory authority exists and unless clearly specified in writing in said contract.

(h) Authority

The authority of the Secretary under section 81 of this title, relating to management contracts regulated pursuant to this chapter, is hereby transferred to the Commission.

(i) Investigation fee

The Commission shall require a potential contractor to pay a fee to cover the cost of the investigation necessary to reach a determination required in subsection (e) of this section

(Pub. L. 100-497; § 12, Oct. 17, 1988, 102 Stat.)

§ 2712. Review of existing ordinances and contracts

(a) Notification to Submit

As soon as practicable after the organization of the Commission, the Chairman shall notify each Indian tribe or management contractor who, prior to October 17, 1988, adopted an ordinance or resolution authorizing class II gaming or class III gaming or entered into a management contract, that such ordinance, resolution, or contract, including all collateral agreements relating to the gaming activity, must be submitted for his review within 60 days of such notification. Any activity conducted under such ordinance, resolution, contract, or agreement shall be valid under this chapter, or any amendment made by this chapter, unless disapproved under this section.

(b) Approval or Modification of Ordinance or Resolution

(1) By no later than the date that is 90 days after the date on which an ordinance or resolution authorizing class II gaming or class III gaming is submitted to the Chairman pursuant to subsection (a) of this section, the Chairman shall review such ordinance or resolution to determine if it conforms to the requirements of section 2710(b) of this title.

(2) If the Chairman determines that an ordinance or resolution under subsection (a) of this section conforms to the requirements of section 2710(b) of this title, the Chairman shall approve it.

(3) If the Chairman determines that an ordinance or resolution submitted under subsection (a)

of this section does not conform to the requirements of section 2710(b) of this title, the Chairman shall provide written notification of necessary modifications to the Indian tribe which shall have not more than 120 days to bring such ordinance or resolution into compliance.

(c) Approval or Modification of Management Contract

(1) Within 180 days after the submission of a management contract, including all collateral agreements, pursuant to subsection (a) of this section, the Chairman shall subject such contract to the requirements and process of section 2711 of this title.

(2) If the Chairman determines that a management contract submitted under subsection (a) of this section, and the management contractor under such contract, meet the requirements of section 2711 of this title, the Chairman shall approve the management contract.

(3) If the Chairman determines that a contract submitted under subsection (a) of this section, or the management contractor under a contract submitted under subsection (a) of this section, does not meet the requirements of section 2711 of this title, the Chairman shall provide written notification to the parties to such contract of necessary modifications and the parties shall have not more than 120 days to come into compliance. If a management contract has been approved by the Secretary prior to October 17, 1988, the parties shall have not more than 180 days after notification of necessary modifications to come into compliance.

(Pub. L. 100-497, § 13, Oct. 17, 1988, 102 Stat.)

Supreme Court, U.S.
FILED
JUL 29 1994
OFFICE OF THE CLERK

No. 94-14

In The

Supreme Court of the United States

October Term, 1994

UNITED STATES OF AMERICA ex rel. KENNETH MOSAY, MARY WASHINGTON, and ARCHIE MOSAY, Individually and on behalf of the ST. CROIX BAND OF CHIPPEWA INDIANS,

Petitioners,

vs.

BUFFALO BROTHERS MANAGEMENT, INC., an Illinois Corporation, INTERSTATE GAMING SERVICES, INC., an Illinois Corporation, ROY C. PALMER, and RONALD G. BROWN,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

James R. Troupis
Counsel of Record

Jon G. Furlow
Raymond P. Taffora
Michael, Best & Friedrich
One South Pinckney Street
P.O. Box 1806
Madison, WI 53701-1806
Telephone: (608) 257-3501

Attorneys for Respondents Roy C. Palmer and Ronald G. Brown

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

Whether this Court should grant Petitioner's Writ of Certiorari to review whether the Seventh Circuit Court of Appeals properly applied the plain language of 25 U.S.C. § 81 and the Indian Gaming Regulatory Act (25 U.S.C. § 2701 *et seq.*) to affirm the dismissal of Petitioners' lawsuit?

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STATEMENT OF THE CASE

I. Nature Of The Case

This case concerns two management agreements (the "Management Agreements") for tribal casinos in Turtle Lake and Danbury, Wisconsin. The parties to the Management Agreements are one of the Respondents, Buffalo Brothers Management, Inc. ("Buffalo Brothers") and the St. Croix Chippewa Indians of Wisconsin (the "St. Croix Chippewa"). Buffalo Brothers and the St. Croix Chippewa are satisfied with the Management Agreements and, on January 28, 1992, the Bureau of Indian Affairs ("BIA") (as delegated by the Secretary of the Interior) officially approved the Management Agreements as required by 25 U.S.C. § 81. Petitioners are three dissident members of the St. Croix Chippewa,[1] one of whom voted as a member of the St. Croix Tribal Council in favor of entering into the Management Agreements with Buffalo Brothers. (R. 88, p. 99; R. 87, p. 138, 142-43).[2] Nonetheless, after the tribal casinos opened and were successful, the Petitioners filed

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[1] The caption of the case, chosen by the Petitioners, is misleading to the extent it suggests they are proceeding on behalf of the St. Croix Chippewa. As set forth herein, the St. Croix Chippewa fully support Buffalo Brothers and at all stages have vigorously opposed the Petitioners' actions.

[2] Citations to portions of the record in the Court of Appeals are designated (R. ___) and refer to the district court docket record numbers. That docket record is contained at item 1 in the Petitioners' Appendix submitted to the court of appeals. Citations to Petitioners' Court of Appeals Appendix are referenced as "C.A. App. ___". The decisions below are referred to by reference to the Petitioners' Appendix before this Court as "App. ___."

this lawsuit to void the Management Agreements and recover half of the proceeds pursuant to 25 U.S.C. § 81. The total value of these proceeds exceeds $10 million.

II. The Parties And Proceedings Below

The Petitioners, Kenneth Mosay, Mary Washington, and Archie Mosay ("Petitioners"), filed this litigation in the United States District Court for the Western District of Wisconsin. Counts I and II of Petitioners' Complaint alleged that the Management Agreements were not approved by the BIA pursuant to 25 U.S.C. § 81. Counts III and IV of Petitioners' Complaint alleged violations of the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701 *et seq.* Although Petitioners hint at claims of improper self-dealing, there was no breach of fiduciary duty claim alleged in the Complaint. (R. 2).

The Respondents are Buffalo Brothers Management, Inc., Interstate Gaming Services, Inc., Ronald Brown and Roy Palmer. Respondents moved to dismiss Counts III and IV because IGRA provides no private cause of action and also moved to dismiss the entire case for failure to join the St. Croix Chippewa as an indispensable party and for lack of standing. (R. 5). The St. Croix Chippewa, through its Tribal Council, joined in supporting Respondents' motion. (R. 19). On March 16, 1993 the district court dismissed the IGRA claims contained in Counts III and IV because IGRA provides no private cause of action. (R. 32).

Several months later, Petitioners and Respondents filed cross motions for summary judgment. (R. 53, 71). The St. Croix Chippewa joined Respondents' position and

opposed Petitioners. (R. 69). On August 17, 1993 the district court entered summary judgment in favor of Respondents finding that the Management Agreements were properly approved by the BIA. (R. 162; App. 14a-23a). Petitioners appealed to the Seventh Circuit Court of Appeals. (R. 185). The court of appeals affirmed the district court decision. (App. 1a-13a). The court of appeals held that the Management Agreements were properly approved by the BIA, and a separate lease agreement between Interstate Gaming Services, Inc. ("Interstate") and the St. Croix Chippewa was not subject to review under 25 U.S.C. § 81. (*Id.*)

III. Factual Background

The St. Croix Chippewa are a federally recognized Indian tribe residing on lands within the State of Wisconsin. They are not a party to this action and opposed the suit in both the district court and the court of appeals. (R. 19, 69). Petitioners Kenneth Mosay, Mary Washington and Archie Mosay are enrolled St. Croix Chippewa. (R. 87, pp. 138, 142, 143; R. 88, p. 99; R. 82, Exh. 3). Buffalo Brothers and Interstate are Illinois corporations and Roy C. Palmer and Ronald G. Brown are individuals residing outside of Wisconsin, each of whom has interests in Interstate and Buffalo Brothers.

A. The Interstate Lease Agreement

Like many Indian tribes across the nation, the St. Croix Chippewa are involved in various Indian gaming activities. (R. 87, p. 68; R. 77, p. 2 ¶ 4; R. 78, pp. 4-5 ¶ 12). In January 1991, the St. Croix Chippewa negotiated a

five-year equipment lease with Interstate whereby Interstate would supply slot machines to the St. Croix Chippewa on standard terms offered in the industry. (R. 87, pp. 90-91). The lease provided that Interstate would supply video and slot machines at no risk to the Tribe and the St. Croix Chippewa would retain 70 percent of the money generated by the machines and Interstate would retain the balance as its lease payment. (C.A. App. 6-27, Sec. IV A-E). Petitioner Kenneth Mosay testified that this lease was a "fair agreement," the percentage split was "average," and the same rate was quoted to the Tribe by at least one other potential lessor. (R. 87, p. 99).

Petitioners do not challenge this lease and the district court found that "[i]t is conceded by plaintiffs' that the Interstate lease is not an agreement relating to Indian lands which requires independent approval under 25 U.S.C. § 81." (App., p. 21a). The Seventh Circuit agreed and concluded that the Interstate Lease "is not a contract for services 'relative to [Indian] lands' as that term has been interpreted in cases under 25 U.S.C. § 81." (App., p. 4a).

B. The Buffalo Brothers Management Agreements

In June 1991, the United States District Court for the Western District of Wisconsin opened the door for expanded Indian gaming in Wisconsin. *See Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin*, 770 F. Supp. 480 (W.D. Wis. 1991). The St. Croix Chippewa and other tribes began to explore opportunities for casino-type gaming such as slot machines, black jack, etc. (R. 82, p. 177). In August 1991, Buffalo Brothers entered

into a management agreement with the St. Croix Chippewa for the Turtle Lake Casino. A management agreement between Buffalo Brothers and the St. Croix Chippewa for a smaller secondary casino operation in Danbury, Wisconsin was signed September 20, 1991. (R. 81, Exh. 11, p. 29).

The Management Agreements were entered into after the St. Croix Chippewa leadership, including both Petitioners Mosay and Washington, solicited and considered in an open process competing proposals from casino management companies to provide expertise and financial backing to create a casino gaming operation. (R. 87, pp. 122-23; R. 88, p. 53). Buffalo Brothers participated in the bidding process. (R. 87, pp. 132-34). The St. Croix Chippewa were aware throughout that process of their pre-existing Interstate lease obligation and were aware that Palmer and Brown were Interstate shareholders. (R. 88, p. 99; R. 87, pp. 131, 142 and 143; R. 82, pp. 41, 53, 54, 96).

Ultimately, Buffalo Brothers and another management company, Grand Casino, Inc., made proposals to the St. Croix Chippewa to supervise the construction, staffing and management of the new casino. (R. 87, pp. 132-34). After reviewing the proposals by Grand Casino and Buffalo Brothers both internally and with its attorneys and advisors, the St. Croix Tribal Council approved, and Petitioner Ken Mosay voted in favor of an agreement with

Buffalo Brothers for management of a Turtle Lake casino. (R. 87, p. 138 and Exh. 5 (tribal resolution)).[3]

At the time the Management Agreements were signed, the St. Croix Chippewa had substantial experience in dealing with complex legal and business matters. Aside from operating the tribal affairs generally, they had actively participated in legal actions to open lands to gaming with their counsel, Howard Bichler, and had been in the forefront of seeking expanded opportunities for Native Americans. *See, e.g., Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, 775 F. Supp. 321 (W.D. Wis. 1991) (St. Croix Band was a named plaintiff in treaty rights action). The financial terms of the Management Agreements comply with the financial requirements of IGRA and the State of Wisconsin/St. Croix Chippewa Gaming Compact. (R. 86, pp. 124, 125; C.A. App. 198-238; 25 U.S.C. §§ 2711(b)(1), (2); R. 68, pp. 2954-2967; R. 77, p. 6 ¶ 19).

C. The BIA Approval Of The Management Agreements

The St. Croix Chippewa were responsible for meeting the statutory submission and approval requirements. (R. 77, p. 9 ¶ 28; R. 78, pp. 6-7 ¶ 24; R. 84, p. 64). In September 1991, the St. Croix Chippewa submitted the Management Agreements and other required information to the BIA for review, investigation and approval. (R. 84,

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[3] It was a Mr. Dave Anderson at Grand Casino who ultimately contacted Ken Mosay in Fall, 1992 and suggested that he get an attorney to sue Buffalo Brothers. (R. 88, pp. 17-20).

pp. 77, 78; R. 80, Exh. D). The information submitted to the BIA disclosed that Palmer and Brown were shareholders of Interstate as well as other corporations and indicated that Interstate was already leasing equipment to the St. Croix, as well as other tribes. (R. 84, pp. 88, 89; C.A. App. 98-99; R. 81, Exh. 11, pp. 23-24).

On January 28, 1992 after a full and complete review, the BIA approved the Management Agreements. (R. 81, Exh. 17-20; C.A. App. 56, 58, 117-118). The BIA, like the Tribal Council, knew that Buffalo Brothers and Interstate had common shareholders – Brown and Palmer. (R. 84, pp. 82, 83; C.A. App. 50, 98-109). The BIA also knew of the financial arrangement in the Management Agreements whereby the lease rental payments would be paid as an operating expense prior to the management payment to Buffalo Brothers. (*See* C.A. App. 31-32, 45-46; R. 85 pp. 61, 62). Dr. Earl Barlow, the Area Director of the BIA, testified that the Buffalo Brothers Management Agreements remain in full force and effect, having been given a thorough review and having received written approval pursuant to Section 81. (R. 84, pp. 88, 89).

D. The Buffalo Brothers Investment In The Casino And Commitments To The Tribe

As a consequence of the Tribal and BIA approvals, Buffalo Brothers invested over $7 million to build a casino at Turtle Lake. (C.A. App. 29 § 1.9; R. 77, pp. 9-11 ¶¶ 30, 33; R. 78, pp. 5-6; R. 68, pp. 2590-2921). To finance the project, Buffalo Brothers entered into a participation

agreement with the Bank of Turtle Lake under which the Bank of Turtle Lake would lend money to the St. Croix Chippewa, but Buffalo Brothers would buy 99 percent of the loan and provide 99 percent of the cash for the loan. (R. 68, pp. 2590-2921).[4]

The setting in 1991 when the Management Agreements were executed was quite different from that existing in 1993. Larry Gru, the investment banker for the project, testified that there was "nervousness" about the success of the casino because huge casinos at Mystic and Hinckley in the Twin Cities area were also opening. (R. 86, pp. 48, 49). The history of St. Croix Chippewa gaming showed that the St. Croix Chippewa slot machines at Round Lake were losing money and, in fact, they were removed because they were not productive. (R. 87, p. 23).

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[4] This financing was necessary because in 1991, the St. Croix Chippewa were virtually bankrupt. (R. 88, p. 53; R. 82, pp. 98-100). They described their financial situation in a meeting with the State of Wisconsin Gaming Commission:

> In 1991, the tribal chairman described the St. Croix Chippewa as the "poorest tribe in Wisconsin," and "hopelessly in debt." The tribe had over $1 million of past due bills and was in potential default of its BIA guaranteed loan. . . . The tribe was over $1 million in debt and, as a result, could neither obtain credit nor incur any additional financial risk.

(R. 68, p. 2945). Unlike other tribes, the St. Croix Chippewa tribal lands are far from any major population center or tourist attraction. (R. 78, p. 5 ¶ 16). The eventual site of the casino – Turtle Lake, Wisconsin – is on a secondary highway more than an hour drive from any town of more than 10,000 people. (R. 78, p. 5 ¶ 16; R. 77, p. 6 ¶ 21). Even those few towns were closer to other reservation lands and established or proposed casinos of other tribes. (R. 78, p. 5 ¶ 16).

An April 1993 audit of St. Croix's Round Lake location confirmed there had been a net loss. (R. 87, p. 23).

The Tribe negotiated a number of important provisions into the Management Agreements. There was a sunset provision which terminated the Management Agreements after a number of years and, in order to facilitate transfer of control at that time, Buffalo Brothers agreed to teach tribal members the gaming operation, employ members of the Tribe requesting a job, and act to create an independent casino operation. (C.A. App. 40-41, § 5.8.2; R. 88, pp. 126-128). Buffalo Brothers voluntarily provided funds for the Tribe to pay outstanding, defaulted obligations. (R. 88, p. 47). The results were that within the casino's first year, tribal unemployment dropped from 85 percent to 15 percent. (R. 68, p. 2951 at C.A. App. 29; R. 88, pp. 121 and 122).

E. The Success Of The St. Croix Casino

The St. Croix Casino opened in May 1992. (R. 13, Exh. B, p. 100). The results were exceptional, and led to subsequent infrastructure improvements in the Turtle Lake and Danbury communities, including two hotels, parking lots, restaurants and numerous off-site facilities. (R. 87, Exh. 36; R. 88, Exh. 83-84). Revenues rose and the operation was an unequivocal success. (R. 68, pp. 2944-47; R. 81, Exh. 27-29). There is little tribal unemployment, the St. Croix Chippewa are out of debt, now have substantial assets, and revenues have allowed for a tribal loan program, health care and other services. (*Id.*) Much of the success, according to the investment bankers and other experts, is the quality of the facility and is a direct result

of Buffalo Brothers management efforts. (R. 86, pp. 116 and 117; R. 79, p. 6 ¶ 14).

Shortly after the casino opened in the summer of 1992, and on several later occasions, the Respondents offered to sell the gaming machines to the Tribe rather than continuing to lease the machines from Interstate. (R. 82, p. 138; R. 13, Exh. B, p. 141; R. 77, pp. 10-11 ¶¶ 31-34). The Tribe refused because they did not yet have experience with the casino and were concerned about whether the casino would be profitable in the winter months in northern Wisconsin. (*Id.*). In December 1992, the Tribal Council elected to purchase the machines from Interstate. (R. 13, Exh. B, pp. 144-45). The St. Croix Chippewa agreed, and since January 1993 Interstate has had no further dealings with the St. Croix Chippewa. (C.A. App. 184-190).

The review of the Management Agreement also continued. Buffalo Brothers resubmitted the Management Agreements to the National Indian Gaming Commission ("NIGC" or "Commission"). (R. 80, Exhs. A, B, C). That administrative agency process includes a review of the Management Agreements, the Buffalo Brothers shareholders, officers and directors, and any aspect of the operations which have occurred or will occur at the casino.

SUMMARY OF ARGUMENT

Petitioners have failed to identify or satisfy any of the criteria for obtaining a writ of certiorari. Instead, they have attempted to obtain review by rehashing the same

tired arguments which have been presented, fully considered and rejected by the district court and court of appeals. There is nothing particularly significant or important about this case or the decisions below. It is a garden variety case of statutory construction where the courts below have applied the plain language of two federal statutes to determine the rights of Petitioners vis-a-vis Respondents. The most Petitioners can say is that the decisions below have created a four year "gap" of enforcement of these statutes. This is wrong as a matter of fact and, in all events, points only to a short lived, episodic issue which is not appropriate for review.

REASONS FOR DENYING THE WRIT

I. Petitioners Fail To Identify Or Satisfy The Standards Necessary For Obtaining A Writ Of Certiorari

Certiorari review is limited to cases where there are "special and important reasons therefor." Sup. Ct. R. 10. The problems should reach beyond the "academic or the episodic." *Rice v. Sioux City Memorial Park Comm'n*, 349 U.S. 70, 74 (1955). Petitioners have not met or attempted to demonstrate the usual standards for considering a writ to a United States Court of Appeals. The court of appeals did not create a conflict with any decision of this Court, a coordinate court of appeals, or a state court of last resort. *See* Sup. Ct. R. 10.1(a). Petitioners do not suggest that the court of appeals has, or has sanctioned a departure from the accepted and usual course of judicial proceedings as to require this Court's supervision. *Id.* Nor have the Petitioners directly identified and articulated any specific

"important question of federal law" which should be settled by this Court. *See* Sup. Ct. R. 10.1(c).

Petitioners instead try to obtain review by characterizing the court of appeals decision as "creating a gap in the implementation of IGRA". (Pet. Br., p. 11). As detailed below, this is not correct and only serves to rehash the arguments which were fully considered and rejected below by the district court and court of appeals. More fundamentally, this argument does not raise any "special and important issues" which justify giving Petitioners a third opportunity to air complaints which have already been soundly rejected twice. Sup. Ct. R. 10.

The fundamental question is quite simple: did the Management Agreements comply with the IGRA and 25 U.S.C. § 81? Both the district court and the court of appeals agreed that based on the application of the plain language of the statutes, the Management Agreements did comply with IGRA and 25 U.S.C. § 81. There is no "special and important issue" which arises from a decision to determine the rights of Petitioners and Respondents by applying the plain and ordinary meaning of IGRA and 25 U.S.C. § 81.

The courts below followed the procedure for statutory construction which is mandated by this Court. This Court has repeatedly and consistently emphasized that the starting point in statutory interpretation is the "language [of the statute] itself." *Ardestani v. INS*, 112 S. Ct. 515, 116 L. Ed. 2d 496, 504 (1991 (citing *United States v. James*, 478 U.S. 597, 604 (1986) (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J. concurring)). There is a "strong presumption" that the

plain language of the statute expresses congressional intent, and is rebutted only in "rare and exceptional circumstances," *Ardestani v. INS*, 112 S. Ct. 515, 116 L. Ed. 2d 496, 505 (1991) (citing *Rubin v. United States*, 449 U.S. 424, 430, 66 L. Ed. 2d 633, 101 S. Ct. 698 (1981)) and only when a "contrary legislative intent is clearly expressed." *Id.*

The Petitioners' writ of certiorari should be denied.

II. The Seventh Circuit Court Of Appeals Correctly Applied The Plain Language Of The Indian Gaming Regulatory Act And 25 U.S.C. § 81 To Affirm The Dismissal Of Petitioners' Lawsuit

The court of appeals correctly applied the plain language of IGRA and 25 U.S.C. § 81 to affirm the dismissal of Petitioners' claims. Section 81 is an ancient statute enacted in 1876 which governs certain contracts "relative to [Indian] land." It is undisputed that the Management Agreements were submitted to and officially approved by the BIA pursuant to 25 U.S.C. § 81. (R. 81, Exhs. 17-20; App. 56, 58, 117-18). The Petitioners also concede below that the Interstate lease was not a contract which requires BIA approval pursuant to 25 U.S.C. § 81.

The statute on which Petitioners really focus is IGRA. Congress enacted IGRA on October 17, 1988 for the specific purpose of regulating Indian gaming. IGRA is enforced by the National Indian Gaming Commission and a series of regulations promulgated by the Commission. Prior to the creation of the Commission and promulgation of regulations, Indian gaming was regulated through the BIA review and approval of management contracts

pursuant to 25 U.S.C. § 81. *See, e.g., Wisconsin Winnebago Business Comm. v. Koberstein*, 762 F.2d 613, 616 n.3 (7th Cir. 1985); *United States ex rel. Shakopee Mdewakanton Sioux Community v. Pan American Management Company*, 616 F. Supp. 1200 (D. Minn. 1985) (applying § 81 analysis to management contracts).

A. The Seventh Circuit Correctly Applied The Plain Language Of IGRA And 25 U.S.C. § 81

Respondents agree that IGRA was effective on October 17, 1988. The crux of the dispute, however, is how IGRA is applied from the date it was effective to the date the Commission is formed and regulations are promulgated. Petitioners' theory is that once IGRA was enacted in 1988, the BIA was required to apply IGRA standards when reviewing contracts pursuant to 25 U.S.C. § 81. Based on this theory, Petitioners claim that the Management Agreements do not comply with 25 U.S.C. § 81 because the pre-existing Interstate lease was not simultaneously submitted to BIA with the Management Agreements as a "collateral agreement" pursuant to 25 U.S.C. § 2711(a)(3).

The court of appeals rejected Petitioners' theory because 25 U.S.C. § 81 contains no requirements (and does not even mention) "collateral agreements" as a condition or criteria for approval and the plain language of 25 U.S.C. § 2709 does not require (and does not permit) the application of IGRA standards until the Commission is "organized and prescribes regulations." (App., p. 12a). This conclusion is supported by the testimony of Anthony Hope, the Chairman of the National Indian

Gaming Commission, who agreed that the BIA should not have been applying IGRA standards during this period prior to the formation of the Commission and prescription of regulations by the Commission. (R. 166, p. 14).

The plain language of IGRA also supports the finding by the court of appeals. Section 2709 states in full:

> Notwithstanding any other provision of this chapter, *the Secretary shall continue to exercise those authorities vested in the Secretary on the day before October 17, 1988,* relating to supervision of Indian gaming until such time as the Commission is organized and prescribes regulations. The Secretary shall provide staff and support assistance to facilitate an orderly transition to regulation of Indian gaming by the Commission.

25 U.S.C. § 2709 (emphasis added). The district court and court of appeals correctly decided that since the Commission was not organized and had not prescribed regulations as of January 1992, the BIA properly exercised its authority to review and approve the Management Agreements pursuant to 25 U.S.C. § 81 without regard for IGRA. This decision is correct because 25 U.S.C. § 81 was the only authority which existed "on the day before [IGRA was enacted on] October 17, 1988." The court of appeals recognized that since "the Commission would not spring magically into existence with the touch of the congressional wand, on October 17, 1988 Congress preserved the old system of regulation until such time as the Commission did come into existence." (App., p. 11a).

B. The Seventh Circuit Did Not Create a Statutory "Gap"

The decisions below do not create the "gap" in review as claimed by Petitioners. 25 U.S.C. § 2712 requires the Commission to re-review all contracts which were approved under 25 U.S.C. § 81 prior to the enactment of IGRA on October 17, 1988. 25 U.S.C. § 2712(a). 25 U.S.C. §§ 2710(d)(9) and 2711(a) also require the Commission to review all contracts entered into once the Commission is organized and prescribed regulations. Finally, the Commission promulgated regulations requiring the approval of Management Agreements previously approved by the Secretary. *See* 25 C.F.R. §§ 533.1 and 533.2.

Petitioners want the Court to believe that all contracts in the "gap" period between October 17, 1988 and February 22, 1993 escape review. This is wrong. This "gap" contingency was specifically addressed in the regulations promulgated by the Commission. 25 C.F.R. § 533.2 expressly authorizes the Commission to re-review all remaining contracts – including the Management Agreements at issue in this case – which were entered into after the enactment of IGRA, but prior to the time the Commission was organized and regulations prescribed. 25 C.F.R. § 533.2. This eliminates any concerns raised by Petitioners that "the court of appeals decision permanently isolates this group of contracts from IGRA standards" (Pet. Br., pp. 28-29).

C. Respondents Strictly Complied with the Law

The Court should not be persuaded to grant a writ on the Petitioners' baseless claims that Respondents have somehow evaded the law. Respondents have, in fact, complied with IGRA even though compliance was not required. When the St. Croix Chippewa submitted the Management Agreements to the BIA for approval in September 1991, the existing IGRA legislative history *excluded* equipment leases such as the Interstate lease from the IGRA management approval process. S. Rep. No. 446, 100th Cong., 2d Sess. (1988) states:

> Management Contracts. – As used in section 12 and throughout the bill, the term "management contract" refers to agreements governing the overall management and operation of an Indian gaming facility by an entity other than the tribe or its employees. *The term "management contract" does not include contracts or agreements for the procurement of particular services, materials or supplies.* These service or supply agreements, including the supply of gaming aids such as pulltabs, computers, punch boards, and communications or other equipment, are subject to regulation under section 11(b)(2)(D) [25 U.S.C. § 2710(b)(2)(D)]. Charges associated with such services, materials, supplies or equipment are to be included as part of the total operating expenses in determining the net revenues under section 4(10).

Id. at 15, *reprinted in* 1988 U.S. Code Cong. & Admin. News 3071, 3085 (emphasis added).

The first guidance for the § 2711 "collateral agreement" disclosure did not come until the proposed regulations of November 1991 (*i.e.*, two months *after* tribal submission of the Management Agreements and shortly before their approval by the BIA). *See* 56 Fed. Reg. 56278 (1991). Even then, these proposed regulations made it clear that "collateral agreement" would *not* include a pre-existing written lease. The commentary states:

> The Commission looked to case law to determine the meaning of collateral agreement. A collateral agreement is *a prior or contemporaneous oral agreement between parties to a contract which is covered by the Statute of Frauds*. That statute prohibits legal actions on certain contracts unless they are in writing. Courts generally separate out collateral agreements from the main contract for the purpose of admitting parol (oral) evidence concerning the collateral agreement. For that purpose, courts have developed a three part test: (1) Whether the agreement is an independent collateral agreement separate and distinct from the main contract; (2) whether the agreement is consistent with the provisions of the contract; and, (3) whether the agreement is such that the parties could not reasonably be expected to embody it in the contract, but would naturally make it as a separate agreement. *Markoff v. Kreiner*, 23 A.2d 19 (1941). Implicit in the test is a fourth criterion: (4) Whether the identity of the parties is the same. When all four parts of the test are met, the Commission would consider an agreement as a collateral agreement and therefore subject to the statutory requirements concerning management contracts.

56 Fed. Reg. 56279-80. Even Dr. Earl Barlow, the BIA Area Director who reviewed and approved the Management Agreements, properly concluded, and so testified, that at this time he understood a "collateral agreement" to mean a "prior or contemporaneous *oral* agreement." (R. 84, p. 40). In short, there is no way to consider a pre-existing unrelated *written* lease, with obligations separate and distinct from management agreements, with a separate and distinct corporate entity, to be within this proposed regulation.

It was not until April 9, 1992, over a *month after* the official BIA approval of the Management Agreements, that other proposed federal regulations first suggested that the definition of "collateral agreements" would be expanded to potentially include equipment leases.[5] This regulation was published *after* official BIA approval of the Management Agreements and the regulation specifically stated that it reflected a change of interpretation:

> The Commission had, in its preamble to the proposed rule, indicated it would view collateral agreements narrowly. *Upon reflection the Commission decided a broader definition would more closely implement Congress' intent.*

57 Fed. Reg. 12382, 12388 (1992). This regulation did not become effective until February 22, 1993, three months *after the filing of this lawsuit*, and two months after the

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[5] Dr. Barlow testified that at best it was not until March 1992 (two months after his approval of the Buffalo Brothers Management Agreement) that there was ever any discretionary guidance mentioning equipment leases in Section 81. (R. 84, p. 63).

Interstate lease was ended. (R. 84, p. 52). Neither the Secretary nor the Buffalo Brothers are prescient. They could not predict the future, nor should they be obligated to comply with regulations not yet promulgated at the time the Management Agreements were submitted. The fact remains that the Management Agreements were properly submitted and approved pursuant to 25 U.S.C. § 81. Nothing more is required.

The Petitioners' Writ of Certiorari should be denied.

CONCLUSION

The fundamental issue in this case is the interpretation of two federal statutes. This Court has provided numerous decisions on the interpretation of statutes, and the district court and court of appeals have abided by those decisions. The court of appeals has produced a clear and well reasoned decision utilizing the applicable decisions of this Court in interpreting a clear and unambiguous statute, encompassing the intent of Congress. Therefore, Respondents respectfully request that the Petition for Writ of Certiorari be denied.

Dated this 29th day of July, 1994.

Respectfully submitted,

JAMES R. TROUPIS
Counsel of Record

JON G. FURLOW
RAYMOND P. TAFFORA
MICHAEL, BEST & FRIEDRICH
900 Firstar Plaza
One South Pinckney Street
Post Office Box 1806
Madison, WI 53701-1806
Telephone: (608) 257-3501

Attorneys for Respondents
Roy C. Palmer and
Ronald G. Brown

(3)

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No. 94 - 14

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

UNITED STATES EX REL. KENNETH MOSAY, MARY WASHINGTON, AND ARCHIE MOSAY, AND KENNETH MOSAY, MARY WASHINGTON, AND ARCHIE MOSAY, INDIVIDUALLY AND ON BEHALF OF THE ST. CROIX BAND OF CHIPPEWA INDIANS,

Petitioners,

vs.

BUFFALO BROTHERS MANAGEMENT, INC., INTERSTATE GAMING SERVICES, ROY C. PALMER, AND RONALD G. BROWN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

Michael J. Wahoske
Counsel of Record
Steven J. Wells
DORSEY & WHITNEY
220 South Sixth Street
Minneapolis, MN 55402
Telephone: (612) 340-2600

Attorneys for Petitioners

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In The
Supreme Court of the United States

October Term, 1994

No. 94 - 14

UNITED STATES EX REL. KENNETH MOSAY, MARY WASHINGTON, AND ARCHIE MOSAY, AND KENNETH MOSAY, MARY WASHINGTON, AND ARCHIE MOSAY, INDIVIDUALLY AND ON BEHALF OF THE ST. CROIX BAND OF CHIPPEWA INDIANS,

Petitioners,

vs.

BUFFALO BROTHERS MANAGEMENT, INC., INTERSTATE GAMING SERVICES, ROY C. PALMER, AND RONALD G. BROWN,

Respondents.

REPLY TO BRIEF IN OPPOSITION

I. Introduction

In attempting to trivialize the decision of the court of appeals below, respondents Palmer and

Brown[1/] construct a "factual background" of irrelevant, inadmissible and disputed allegations and a legal analysis that ignores the express language of the applicable statutes. The court of appeals decision allows respondents to make off with over $23,000,000 (R. 158, Exs. And B) that, pursuant to 25 U.S.C. § 81 ("Section 81") and the Indian Gaming Regulatory Act, 25 U.S.C. § 2701, et seq., ("IGRA), should have been returned to the St. Croix Band of Chippewa ("Tribe"). Further, the decision of the court below ensures that neither the Tribe here nor any other tribes will ever be able to recover the millions of dollars in tribal revenue lost as a result of contracts which violated IGRA standards and which were entered into during the four-and-a-half year period during which, according to the court of appeals, IGRA was enacted but of no force or effect.

II. The "Facts" Alleged by Respondents Are Irrelevant to the Question Before the Court.

This case was decided on motions for summary judgment. Virtually every factual allegation made by respondents in the "factual background" section of their Brief is irrelevant to the question presented here (and the issues on summary judgment) and was disputed in the courts

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1/ Respondents Buffalo Brothers Management, Inc. and Interstate Gaming Services, Inc. did not, apparently, join in the Brief in Opposition.

below. R. 97, R. 107; Appellants' C.A. Reply Brief at 2-6 and cites therein.2/

The relevant facts were set forth in the opinions of the courts below. The record reflects that respondents Buffalo Brothers Management, Inc. and Interstate Leasing, both wholly owned and controlled by respondents Palmer and Brown, entered into an arrangement with the Tribe that allowed them to reap almost 70 % of the net profits from the Casino operation (in addition to the loan payments by the Tribe); that even before the Casino opened, respondents knew that the leased machines would pay for themselves within a month or two, yet they advised the Tribe to extend the lease period for seven years; that the existence of the lease was never disclosed to the BIA before the management agreements were approved3/; and

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2/ For example, respondents' various claims that the Tribal unemployment dropped and that the Tribe benefitted economically from the Casino operations is not based on any admissible evidence; respondents simply made up these figures. The record does reveal that respondents siphoned off over $23,000,000.00 of money that should have gone to the Tribe under Section 81. R. 158, Exs. A and B.

3/ The undisputed facts in the record reveal that the existing lease was not disclosed in the information submitted to the BIA, and -- worse -- that respondents actively mislead the BIA by suggesting that there were no existing leases. As the district court found in its order granting

that, after this lawsuit was filed, respondents contrived to cancel the lease to insulate it from further review by the BIA. See Petition at 4-10.

These facts highlight the very abuses that Congress intended to remedy by passage of IGRA. If IGRA were effective, the collateral Interstate lease agreement would have been required to have been submitted to the BIA for approval along with the management contracts pursuant to 25 U.S.C. § 2711(a)(3), and the BIA could not have approved of the entire arrangement because it would have violated 25 U.S.C. § 2711(c)(1),(2). Further, petitioners and the Tribe would have a remedy under Section 81 for recovery of the wrongfully obtained monies.4/ Under the court of appeals decision, the very wrongs that Congress addressed in IGRA -- excessive fees to and sweetheart collateral agreements among contractors -- are allowed to go forever unremedied, all to the detriment of the Tribe's economic self-sufficiency and "congressional concerns . . . to protect such

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summary judgment: "The Interstate Lease Agreement was neither submitted or considered as part of the approval of the management agreement." Pet. App. 16a.

4/ As set forth in the Petition, one half of the proceeds of this suit goes to the United States in trust for the Tribe; the net proceeds of the remaining half have been assigned back to the Tribe by petitioners. See Petition at 8 n.5.

gaming as a means of generating tribal revenue." 25 U.S.C. § 2702(3).

III. The Decision of the Court of Appeals Ignores the Plain Language of IGRA.

Respondents state that the plain language of the statute should control. Petitioners agree. But neither the court of appeals nor respondents explain how the court of appeals's interpretation of IGRA comports with the plainly stated congressional intent reflected in the statute. An interpretation that suspends the effective date of IGRA for almost five years simply cannot square with the congressional recognition of the explosive growth and impact of Indian gaming and the urgent need to set standards to govern Section 81 review of management contracts and collateral agreements. 25 U.S.C. § 2701(2),(3). Under the plain language of the statute, the BIA had continuing authority to conduct Section 81 reviews until the National Indian Gaming Commission ("NIGC") was up and running; it was obviously the intent of Congress that the standards it had enacted in IGRA be employed in that review, and not the "inadequate" standards that prompted enactment of IGRA in the first place. Stated differently, the statute clearly does <u>not</u> state that, in conducting Section 81 reviews, the BIA was <u>not</u> to apply the review standards set forth in IGRA. The court of appeals decision not only violates congressional intent; it reads into the statute a prohibition not found in the plain language of IGRA.

IV. The Decision of the Court of Appeals Creates a Significant Statutory Gap.

As respondents recognize, the court of appeals should have decided the question whether the contracts at issue here complied with Section 81 and IGRA. Instead, the court of appeals went far beyond that simple question to find that IGRA, despite enactment in 1988, was completely ineffective between 1988 and 1993. It is this decision that creates the significant and long-term impact of this case.

Respondents disingenuously claim that the court of appeals decision really did not create a four-and-a-half year gap in the enforcement of IGRA. But even the court of appeals recognized that, under its interpretation, the statute was "fractured" because it left a period of almost five years during which management contracts were not subject to IGRA review. There is simply no question that the court of appeals decision created a period between 1988 and 1993 during which management agreements and collateral contracts were not subject to review under IGRA standards. As set forth in the Petition, this gap in the law is an unnecessary and unwarranted departure from congressional intent. It is a gap created by the court of appeals, not the Congress.

Next, respondents try to dismiss the significance of this statutory gap by suggesting that the NIGC has issued regulations allowing it to review gap contracts, i.e., those entered into between the enactment of IGRA in 1988 and the

opening-for-business of the NIGC in 1993. This argument fails for a number of reasons. First, there is no authority for this regulation. IGRA gives the NIGC power to review pre-IGRA and post-NIGC-establishment contracts -- not those entered into during the gap. Clearly, that was to be the function of the BIA. 25 U.S.C. § 2712. Neither respondents nor the courts below ever suggested a statutory basis for the NIGC's regulation allowing gap-period contract review. None exists.

Second, there is no evidence in the record even to suggest what the NIGC is in fact doing with respect to gap contracts. In this case, respondents attempted to submit their gap contracts to the NIGC on their own after petitioners filed their summary judgment motion in an attempt to manufacture a primary jurisdiction argument, which the trial court properly rejected. At the time of discovery in this matter, the NIGC stated that they were not reviewing respondents' contracts. R. 100. Review of gap contracts under 25 C.F.R. § 533.2 is entirely discretionary. Even assuming that the NIGC is conducting some kind of review of the gap contracts, there is nothing in the record to suggest that the NIGC is doing or can do anything to mitigate the harm caused by the court of appeals decision. 5/

5/ If NIGC is conducting a review using the IGRA standards, this simply bolsters petitioners' argument that the IGRA was not ineffective during the gap period.

Third, whatever the NIGC may be doing, the court of appeals decision precludes the tribes from ever recovering revenues lost as a result of gap-period contracts that violated IGRA. It is undisputed that the NIGC does not have the power under IGRA to order IGRA violators to return the wrongfully obtained monies; that is a right reserved for plaintiffs under Section 81. The court of appeals decision precludes a tribe, such as the St. Croix Band of Chippewa, from recovering any monies under Section 81 if its management contracts were entered into and approved by BIA during the gap period, without consideration of collateral agreements in violation of IGRA.

Thus, the Tribe here and the other tribes described in the Report of the Inspector General cited in the Petition are left without the remedy that Congress intended. Respondents attempt to minimize this situation by labelling it "episodic." This "episode," however, has allowed respondents here to siphon off more than $23,000,000.00 in Tribal revenues, and has led to the continuing injustices reflected in the Inspector General's report, all in an area of traditional federal concern. The court of appeals decision cannot be reconciled with either congressional intent or the long-standing policies of the federal government in matters relating to Indians.

V. Respondents Misstate Petitioners' Arguments

As a final matter, respondents set up "straw man" arguments that petitioners have not made. Although petitioners acknowledge that the lease agreement, standing on its own, would not be subject to review under Section 81 and IGRA, the fact that it is collateral to respondents' management contract brings it within the ambit of those statutes. Second, petitioners do not argue that respondents failed to comply with regulations that had not been enacted at the time the management contract was submitted to the BIA, as suggested by respondents. Rather, petitioners claim simply that the lease agreement was a "collateral agreement" under any reasonable definition or understanding of that phrase as it is used in the statute itself, 25 U.S.C. § 2711(a)(3). The fact that the NIGC later promulgated regulations defining "collateral agreement," which were designed to "closely implement Congress' intent", 57 Fed. Reg. 12382, 12388 (1992), and that clearly encompass the contracts at issue here, merely supports petitioners' argument.

VI. Conclusion

For the reasons stated above and in the Petition for Certiorari, petitioners respectfully request that the Court grant a writ of certiorari and set the matter for briefing and argument.

August 4, 1994

Respectfully submitted,

Michael J. Wahoske
Counsel of Record
Steven J. Wells
Michael E. Florey
Mark A. Jarboe
James E. Townsend
DORSEY & WHITNEY
220 South Sixth Street
Minneapolis, MN 55402
Telephone: (612) 340-2600

Attorneys for Petitioners